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Supreme Court of the United States

OCTOBER TERM 1911.

No. 446.

UNITED STATES OF AMERICA,

Appellant,

vs.

THE UNION PACIFIC RAILROAD COMPANY, THE OREGON SHORT LINE RAILROAD COMPANY, THE OREGON RAILROAD & NAVIGATION COMPANY, THE SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, THE SOUTHERN PACIFIC COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, FARMERS' LOAN & TRUST COMPANY, EDWARD H. HARRIMAN, JACOB H. SCHIFF, OTTO H. KAHN, JAMES STILLMAN, HENRY H. ROGERS, HENRY C. FRICK, WILLIAM A. CLARK AND ROBERT S. LOVETT, TRUSTEE,

Respondents.

APPELLANT'S BRIEF OF THE LAW.

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No. 820

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Respondents.

APPELLANT'S BRIEF OF THE LAW.

I.

THE MAINTENANCE OF FREE COMPETITION AMONG RAILWAYS HAS BECOME THE SETTLED POLICY OF THE NATION.

A. *The Interstate Commerce Act, in its provisions against contracts, agreements or combinations between common carriers for pooling, enforces the competitive principle.*

> "Sec. 5. That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense."

B. *The Sherman Law, as construed by the courts is directed against all attempts to suppress competition among interstate carriers or to monopolize interstate commerce.*

United States v. Trans-Missouri Freight Assn., 166 U. S. 290;
United States v. Joint Traffic Assn., 171 U. S. 505;
Northern Securities Co. v. United States, 193 U. S. 197;
National Cotton Oil Co. v. Texas, 197 U. S., 115;
United States v. Standard Oil Co., 173 Fed., 177.

In the Trans-Missouri case the Supreme Court quoted with approval the language of Judge Shiras, as follows: (p. 337):

> "Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition the stronger competitor may crush out the weaker; fluctuations in prices may be caused that result in wreck and disaster; yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world. That free and unrestricted competition in the matter of railroad charges may be productive of evils does not militate against the fact that such is the law now governing the subject. No law can be enacted nor system be devised for the control of human affairs that in its enforcement does not produce some evil results, no matter how beneficial its general purpose may be. There are benefits and there are evils which result from the operation of the law of free competition between railway companies. The time may come when the companies will be relieved from the operation of this law, but they cannot by combination and agreements among themselves, bring about this change. The fact that the provisions of the Interstate Commerce Act may have changed in many respects the conduct of the com-

panies in the carrying on of the public business they are engaged in does not show that it was the intent of Congress, in the enactment of that statute, to clothe railway companies with the right to combine together for the purpose of avoiding the effects of competition on the subject of rates."

In *United States vs. Joint Traffic Association, supra,* the court said (p. 569):

"Has not Congress with regard to interstate commerce and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combinations shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has.

* * * * * * *

"Where the grantees of this public franchise are competing railroad companies for interstate commerce, we think Congress is competent to forbid any agreement or combination among them by means of which competition is to be smothered.

* * * * * * *

"We do not think, when the grantees of this public franchise are competing railroads seeking the business of transportation of men and goods from one State to another, that ordinary freedom of contract in the use and management of their property requires the right to combine as one consolidated and powerful association for the purpose of stifling competition among themselves, and of thus keeping their rates and charges higher than they might otherwise be under the laws of competition. And this is so, even though the rates provided for in the agreement may for the time be not more than are reasonable. They may easily and at any time be increased. *It is the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting as one body in all the matters over which the combination extends, that consti-*

tutes the alleged evil, and in regard to which, so far as the combination operates upon and restrains interstate commerce Congress has power to legislate and to prohibit."

(Italics are ours.)

In the *Northern Securities* case the court observed (p. 337):

> "We say that Congress has prescribed such a rule, because in all the prior cases in this court the Anti-Trust Act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce. Now, can this court say that such a rule is prohibited by the Constitution or is not one that Congress could appropriately prescribe when exerting its power under the commerce clause of the Constitution? Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine."

In the case of *National Cotton Oil Co. v. Texas, supra,* the court, in speaking of the purposes of the Federal and State statutes against combinations said:

> "According to them, competition and not combination should be the law of trade. If there is evil in this, it is accepted as less than that which may result from the unification of interests and the power such unification gives."

C. *The policy has found expression in the Constitutions and Laws of thirty-seven States and two Territories.*

Attached to this brief as Appendix A will be found a synopsis of the constitutional provisions and of the laws of the several states upon this subject.

The laws of every state through which these railroads run, and particularly the laws of the states under which they are organized, prohibit the acquisition of competing lines or of stock therein.

In Utah, where the Union Pacific, San Pedro and Oregon Short Line Roads are incorporated, the Constitution, Article 12, § 13, provides:

> "No railroad corporation shall consolidate its stock, property or franchises with any other railroad corporation owning a competing line."

The Constitution of Kentucky, where the Southern Pacific Company is organized, provides as follows (Constitution, 1891, Section 201):

> " No railroad * * * company shall consolidate its capital stock, franchises, or property * * * with any other railroad * * * company owning a parallel or competing line * * * or acquire by purchase, lease or otherwise any parallel or competing line."

The Civil Code of California, 1906 (Sec. 465, subd. 12), gives every railroad corporation power:

> "To purchase, lease, or acquire the franchises, rights and property, or any part thereof, of any railroad, corporation * * * ; provided that nothing herein shall authorize any corporation to purchase the franchises, rights and property of any railroad operated in competition with it; and to purchase, acquire

and hold the stocks, bonds or other securities of any railroad corporation organized under the laws of this state or of any other state or territory with full power to sell the same; provided that nothing herein will authorize any corporation to purchase the stock of any railroad corporation operated in competition with it."

D. *The courts have recognized and enforced the policy, both under Statutory and Constitutional provisions, and also in the absence of such provisions.*

Pearsall v. Great Northern Ry., 161 U. S., 646;

Louisville & Nashville R. Co. v. Kentucky, 161 U. S. 677;

Louisville & Nashville Ry. v. Commonwealth of Kentucky, 97 Ky., 675;

East Line & Red River R. Co. v. State, 75 Texas, 434;

Langdon v. Branch, 37 Fed., 449;

Hamilton v. Savannah, Florida & W. Ry., 49 Fed., 412;

Stockton v. Central R. Co. of New Jersey, 50 N. J. Eq. Rep., 52;

Pennsylvania Rd. Co. v. Commonwealth, 7th Atl., 374 (not officially reported);

Pennsylvania R. Co. v. Commonwealth, 7th Atl., 368 (not officially reported);

Commonwealth v. South Penn. Rd., 1 Penn., County Court Rep., 214;

Gulf, Colorado & Santa Fe R. Co. v. State of Texas, 72 Texas, 404;

State v. Vanderbilt, 37 Ohio State, 590;

Texas & Pacific Ry. v. Southern Pacific Ry, 41 La. An., 970;

East St. Louis Connecting Ry. v. Jarvis, 92 Fed., 735;

Central Rd. Co., v. Collins, 40 Ga., 582;

Yazoo & M. V. Ry. Co. v. Southern Ry. Co., 83 Miss., 746;

Currier v. Ry. Co., 48 N. H., 322;

Morrill v. Ry. Co., 55 N. H., 531;

Edwards v. So. Ry., 66 So. Car., 277;

Continental Sec. Co. v. Interborough R. T. Co., 165 Fed., 945;

Clarke v. Central R. & B. Co., 50 Fed., 338.

E. *It is immaterial that one of two competing roads may be organized under the laws of another state or situated beyond the borders of the state having the prohibition.*

Currier v. Railroad Co., 48 N. H., 321;

Morrill v. Railroad Co., 55 N. H., 531.

We do not claim that these laws and constitutions can be enforced in a suit by the government, but they are very important as showing the policy evidenced by the laws and decisions of both the national and state governments, and they are conclusive against the claim of the railway companies that these purchases of stock were made by virtue of authority granted by the several states.

Union Pacific v. Mason City & Fort Dodge Ry. Co., 199 U. S., 160.

In the investigation which preceded the bringing of this cause by the United States, the Interstate Commerce Commission took a large amount of testimony, much of the same being introduced in this record, and made a report in which, among other things they stated as their conclusion that the various lines alleged by the Government to be the subject of this conspiracy, were competitors, (this opinion being contrary to the findings of the trial court), in which report among other things it was said:

> "It is contrary to public policy, as well as unlawful for railways to acquire control of parallel and competing lines. This policy is expressed in the federal laws and in the constitution and laws of nearly every state in the Union. We have examined the constitutions and laws of all the states and find in about forty

of them prohibitions against consolidation of capital stock or franchises of competing railways, or the purchase and acquisition by a railway of competing lines. Competition between railways as well as between other industries is the established policy of the nation."

12 I. C. C. Rep. 347.

This view is very clearly stated by Circuit Judge Hook in his dissenting opinion in the court below:

> "Even if public regulation is believed to be a wiser solution of the important economic problem than enforced competition, with its necessary wastes and burdens, nevertheless his judgment of a law embodying the latter policy should proceed as with distinct approval of its selection. It is quite clear that, with the growth and development of governmental regulation of common carriers engaged in interstate commerce, there is decreasing reason for holding them subject to the Sherman Act, and it may be that as regards rates of transportation the Interstate Commerce Commission could perform its duties with equal justice to the public and greater justice to the railroads if they were released. But certainly that is for Congress, not the courts. The judicial function is properly exercised when the Sherman Act is construed and applied as though it were the only legislative remedy on the statute books."

Opinion of Judge Hook, 188 Fed. Rep. pg. 121.

Whether public regulation of rates, facilities and service by the Interstate Commerce Commission would be as effective in all respects as competition between lines of railway is a matter which remains to be seen. Substantially the only branch of railway control which has been developed by the Interstate Commerce Commission under the law of Congress, has been the regulation of rates. But competition has a wider and more far reaching aspect. It in-

volves service, sufficient and rapid transportation, extension of railways into new territory to serve the needs of a growing country; the acquisition of additional facilities, terminals, side tracks, and many other things which go to make transportation an efficient medium of commerce. It is, we believe, an acknowledged fact that competition where it exists in certain sections has given the people the most efficient railway service in this country. It is difficult for public commissions to force railways to furnish adequate equipment, stations, side tracks and terminals, or to run their trains regularly, rapidly and sufficient in number to accommodate the public, and probably impossible to compel them to construct additional lines and branch lines into portions of the country suffering from lack of any or sufficient transportation facilities. It is very doubtful, should all incentive through competition be taken away, whether it would be possible to obtain these things by legislation and to enforce them by commission. It is a matter of common knowledge that all of these things which are so much to the advantage of the public have always been brought about by the rivalry of competitive railway lines or systems. However that may be, Congress and the states have declared for the maintenance of competition between railways so located that they can indulge in such competition, and if the federal law is to be modified, it must be done by Congress.

II.

PRIOR TO THE ACQUISITION OF THE STOCK OF THE SOUTHERN PACIFIC COMPANY BY THE UNION PACIFIC THE LINES OF THOSE TWO SYSTEMS WERE COMPETITIVE, AND SUCH ACQUISITION HAVING ELIMINATED SUCH COMPETITION WAS THEREFORE IN RESTRAINT OF TRADE IN VIOLATION OF THE ANTI-TRUST ACT.

Judge Adams, speaking for the majority of the court below, said with reference to the purchase of the Southern Pacific stock by the Union Pacific:

> "Its consequences are alleged to have been the destruction or restriction of free competition in transcontinental commerce. Whether such consequences followed depends upon whether these companies were or could have been independent and substantial competitors before the transaction in question occurred." (188 Fed. 110.)

The court then proceeded to state the issue upon this question, but limited that issue to a much narrower field of competition than the Government claimed either in the petition, proof or argument. Judge Adams said:

> "Claim is not made that it (Union Pacific) was such a competitor for any business originating on or near to its main line, but only for business originating in New York or Pittsburgh common points, 1,000 or more miles away from its line."

With due deference to the distinguished judge, this neither is nor was the claim of the Government, and we cannot understand how he fell into such error, as many pages of the Government's brief in the court below were devoted to a discussion in detail of the evidence showing the active

competition that existed for this business originating or terminating in St. Louis, Chicago, Indianapolis, Detroit, Cleveland, Cincinnati, and a great number of smaller cities, including, in fact, all of the territory from the Missouri River line East. We shall not in this brief of the law undertake to review the facts, which are carefully stated in our brief on that subject, but in order to show just exactly what our claim is, and that it includes a broader aspect of competition than as suggested by the learned judge we here point out that it is undisputed that:

Prior to the acquisition of this stock the Union Pacific and its subsidiary lines constituted a system of railways extending from Kansas City and St Joseph, Missouri, Omaha, Nebraska, and Council Bluffs, Iowa (at which points it connected with various lines to the East,) westward through Denver, Cheyenne and Ogden, to the Pacific Coast at Portland, Oregon, with various branches, among others certain ones extending into Idaho and to Butte, Montana, and including a line extending south from Ogden through Salt Lake City over two hundred miles in the state of Utah toward Los Angeles, California. It also had lines of steamers running from Portland, Oregon, to San Francisco, and from Portland, Oregon, to the Orient.

The Southern Pacific owned and controlled lines of steamships from New York to New Orleans and Galveston, and railway lines from those points to Los Angeles, San Francisco and Portland, with a line East from San Francisco to Ogden, and steamship lines from San Francisco to the Orient and to Panama, with various railway branches in Texas, California and other states.

To re-state the Government's contention, it appears that these two lines of railway and steamships were natural and strong competitors for substantially all the traffic between

the entire territory lying East of the Missouri River, including the Atlantic seaboard on the one hand, and Pacific Coast points, including the interior of California, Oregon and Washington, and also ports in the Orient, on the other. A great deal of this traffic originated at points directly tributary to these two systems respectively, to-wit, much of the traffic originating in Oregon, Nevada, Utah and California, as well as the traffic coming from the Orient. It included the following business, which is practically admitted by the defendants to be competitive between the two systems (except that it is objected that as to part of the same the respective companies could only handle the traffic in connection with outside lines) but which it is claimed is of minor importance, to-wit, Asiatic business; traffic between San Francisco and Portland locally; traffic between San Francisco and the Willamette Valley; traffic to and from Portland and all points in the East; traffic between San Francisco and Montana and Idaho points; and traffic between the Atlantic seaboard and Colorado and Utah common points. To show the magnitude of this commerce, carefully prepared statistics were introduced in evidence. These are fully explained in Complainant's Brief of the Facts, pages 383 et seq. It is sufficient to here state that the gross freight earnings of the two systems on their transcontinental traffic including the rail earnings on Oriental traffic, but not including the revenue accruing to the ships, were for the year eding June 30, 1901, about $16,486,-976.93, as shown by the figures prepared by defendants at complainant's request, and which, owing to the loss of records, were made up as of the years 1906 and 1907, the same being by complainant in fairness reduced in the same proportion, that the total freight earnings of the two systems were less in the year ending June 30, 1901, than

the year ending June 30, 1907. Besides those earnings there is additional revenue, as shown on defendants' own exhibits, covering traffic for which it is acknowledged the parties were actually competing as found by the court below, (after making a similar deduction on two items covered by said exhibits, for which the actual figures for 1901 could not be made up) aggregating about $1,586,790.96, or a total competitive freight business for the year the merger took place of about $18,073,767.99. In handling the traffic producing this revenue of $1,586,790.96, neither of the two systems used a foot of the rails of the other; and in addition thereto, as shown by defendants' own exhibits, there was transcontinental business in handling which the two systems were entirely separate, which brought up the total of such freight business to $2,546,500.24, or over 14% of the total freight earnings of the two sytems upon transcontinental and other traffic mentioned in the complaint. This amount of above two and one-half million dollars is the business which the court below regarded as of such minor importance as not to be substantial. The court entirely disregarded in its computations all passenger business clearly shown to be competitive, and which as computed from the testimony, aggregated over three million dollars per year. (Brief of Facts, pgs. 238 & 39, 392 & 3.) The case in so far as the Southern Pacific purchase is concerned, practically divides itself into three questions. The court below decided, first, that as to the transcontinental traffic to and from California, because the larger part of it in which the Union Pacific participated passed over the rails of the Southern Pacific line from Ogden to San Francisco, it was impossible, as a matter of law, for these two great transcontinental railways to be competitors; second, that the additional traffic for which they were competing, above referred

to, was so small and the territory affected so limited, that the restraint of trade was not unreasonable; third, that in determining the question as to whether competition was eliminated and trade restrained, all traffic handled by either of the two companies in connection with other lines must be excluded. We submit that the court erred upon all these points, and that the authorities are conclusive that under the state of facts appearing in the testimony the two systems were competitive.

Northern Securities Co. v. United States, 193 U. S., 197;

Harriman v. Northern Securities Co., 197 U. S., 244;

Pearsall v. Great Northern R'y Co., 161 U. S., 646;

Louisville & Nashville R. R. Co. v. Kentucky, 161 U. S., 677;

Same v. Same, 97 Ky., 675;

United States v. Standard Oil Co., 221 U. S., pg. 1;

Same v. American Tobacco Co., 221 U. S., 106;

Pa. R'y Co. v. Commonwealth, 7 Atl., 368 (not officially reported);

East Line & Red River R'y Co. v. Texas, 75 Texas, 434;

Gulf, Col. & Santa Fe R'y Co. v. Texas, 72 Texas, 404;

Stockton v. Cent. Ry. of N. J., 50 N. J. Eq., 52;

State v. Vanderbilt, 37 Ohio St., 590;

State v. Mont. Ry. Co., 21 Mont., 221;

East St. Louis etc. Ry. Co. v. Jarvis, 92 Fed., 735;

Texas Pac. Ry. Co. v. So. Pac. Co., 41 La. Ann., 970.

It may be claimed that the decisions of this court in the Standard Oil and Tobacco cases have changed the rule of law laid down in the Trans-Missouri and Joint Traffic cases, and that therefore the law now is that the restraint must be unreasonable, and that the acquisition of the stock of this competing line did not constitute an unreasonable restraint, and was therefore valid. The court below evidently hesitated to go thus far, and a careful review of those decisions will show that such is not the result of the decision of this court in these cases. The latter cases did not change the rule laid down in the Trans-Missouri, Joint Traffic and Northern Securities cases, that any substantial and direct suppression of competition between naturally competing lines of railway is a restraint of trade. The language of the court in an opinion must be considered in the light of the facts and circumstances surrounding the particular case. The rule as to restraint of trade as applied to two large competing railway lines, each necessarily a monopoly within its own sphere, is different from the one to be applied to hundreds of independent manufactories or commercial concerns. Any restraint upon the power of each one of these railways to make its own rates, to exercise perfect freedom as to furnishing good transportation, or extending its system, would be in violation of law, when the restraint caused by a minor consolidation of one or two of many hundreds of industrial companies would not be a violation. In other words, the court must look into the circumstances of each case, and if it is found that the restraint is direct, and that it substantially affects the

commerce involved, it is in violation of the Anti-Trust Act. *The elimination of competition between competing lines of railway naturally resulting in increased rates and impairment of service, affects not only the business of such railway corporations, but directly restrains the trade and commerce of the public patronizing such lines.* In the Trans-Missouri case the court had under consideration a traffic association of most of the lines west of the Missouri River. It was admitted in that case that the Union Pacific and the Southern Pacific were competing lines between themselves, as well as with the Burlington, the Missouri Pacific, the Rio Grande, the Northern Pacific, Great Northern and Northwestern. The answer of the Union Pacific Company in that case admitted that the Southern Pacific was a competing line with it (58 Fed. 64).

We quote from the answer, in which the Union Pacific joined:

> "Coming to the merits of the suit these defendants admit that they are common carriers; that, with some exceptions not important here, they owned independent and competing lines of railroad in that part of the United States west of the Missouri and Mississippi Rivers, and that they were engaged in the transportation of freight among the states and territories, and to and from foreign nations in that region, but they deny that they owned the only through lines of railroad engaged in that business there, and allege that there were several others, to-wit, the Northern Pacific Railroad Co., the Great Northern Railway Co., the Southern Pacific Railroad Co., and the Texas Pacific Railroad Co. They admit that some of them were assisted and encouraged to construct and maintain through competing lines of railroad independent of each other, by subsidies, land grants and donations from the United States and from the people of the various states and territories west of the great rivers."

In the opinion of the trial court, which was reversed by this court, we find the following language at page 82:

> "There is nothing in this contract indicating any purpose or attempt to obtain such a monopoly. The great transportation systems of the Great Northern Railway Co., the Northern Pacific Railroad Co., the Southern Pacific Railroad Co. and the Texas Pacific Railroad Co. were operated in the region subject to the regulation of this association, but none of these companies were members of it; and, even if they had been, there would still have been no evidence of any attempt to monopolize trade here, because each member is left to compete with every other for its share of the traffic."

Clearly the Circuit Court of Appeals of the Eighth Circuit, even though by a divided court deciding contrary to the rule laid down by this court upon the appeal in the Trans-Missouri case, had no doubt that the Union Pacific was a competitor of the Southern Pacific. Nor did the Union Pacific entertain any doubt upon the subject. This allegation of the answer is briefly commented on by the statement of the case in this court. (166 U. S. 302).

The Traffic Association agreement in substance provided for fixing rates at a joint meeting, with a proviso that any company might withdraw on ten days' notice. It was, in other words, a *temporary* restraint upon the individual action of each company in making its rates, although the court below decided that it was not an unreasonable restraint. How much stronger is the case at bar where the Southern Pacific including the Pacific Mail Steamship Co. is *perpetually* restrained from taking action independent of the Union Pacific. The holding of this court in that case, that the agreement in question constituted a restraint of trade in violation of the Anti-Trust Act, has never been questioned in any subsequent opinion. In the Joint Traffic case (171

U. S. 505-568) where the whole subject was again reviewed, the court took pains to point out that agreements entered into for the purpose of promoting legitimate business, *and which do not directly restrain trade,* are not illegal, and quoting from the Hopkins case, said at p. 568:

> "An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation with no purpose to thereby affect or restrain interstate commerce, *and which does not directly restrain such commerce,* is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited, that 'the act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have indirectly or remotely some bearing upon interstate commerce and possibly to restrain it.'"
>
> (Italics are ours.)

The court, however, reaffirmed the ruling in the Trans-Missouri case that the agreement to fix rates, even in the first instance, subject to withdrawal of any of the parties, was such a direct restraint as to be illegal.

How infinitely more repugnant to the law is a perpetual arrangement from which no opportunity to withdraw is reserved, as in the case here under consideration.

It is unnecessary for us to review the Standard Oil and Tobacco cases, wherein this court held that applied to railroads the law of these cases was still the law of the land, and in which it was pointed out that the facts and circumstances of each case must be taken into consideration. The court did not decide that where it appears that there is a restraint upon two great systems of competing

roads, it is proper for it to substitute its judgment as to whether such restraint is reasonable or unreasonable. Such restraints were declared illegal. This is evident, for speaking of the prior decisions, the Chief Justice in the Standard Oil case, (page 65), said:

> "That is to say, the cases but decided that the nature and character of the contracts creating as they did a conclusive presumption which brought them within the statute, such result was not to be disregarded by the substitution of a judicial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it was made."
>
> (See also additional quotations from the Standard Oil case in complainant's brief of the facts, pgs. 16 and 17.)

Again, in the Tobacco Case, the court, speaking of these cases, (page 179), said:

> "It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, it was held not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret which inevitably arose from the general character of the term 'restraint of trade' required that the words 'restraint of trade' should be given a meaning which would not destroy the individual right to contract and render difficult, if not impossible, any movement of trade in the channels of interstate commerce,—the free movement of which it was the purpose of the statute to protect."

It is evident that the court meant that ordinary transactions like the creation of partnerships or the case of one

concern buying out another, although eliminating some competition previously existing, which have no appreciable effect upon the commerce of the country, are not restraints of trade within the Act. But there is no language which indicates that where a line of railway is naturally competing with another line or is potentially competitive, one of them may purchase the stock of the other and the court may substitute its judgment for the judgment of Congress as to whether the restraint resulting from such purchase is reasonable or unreasonable, so long as there is a substantial, direct restraint upon competition between such lines of railway. The court in these late decisions said nothing to indicate in the slightest degree that it felt that either the Freight Association case or the Traffic Association case was wrongly decided. If it had intended any such ruling, such intention would and could easily have been expressed in a few words. We submit that it would not be seemly to even suggest that this court would overturn a rule which has stood for years, after being twice reaffirmed, without the use of language which would have left the lower courts and the legal profession in no doubt upon the subject. We therefore assume that in considering the case at bar those decisions, as far as they concern agreements between competing railroads eliminating or destroying their independence and fixing rates or charges or otherwise eliminating competition, are to be applied to their full extent. It will be remembered that one of the vicious provisions in the Joint Traffic agreement, outside of the rate feature, was the one providing for the consolidation of traffic agencies, thus destroying any competition in soliciting business. In view of the undisputed facts in that regard shown by the record in the present case, the ruling upon that provision is important. That the suppression of com-

petition in this case is direct is clearly decided both by the Northern Securities case and the later case of *Harriman v. Northern Securities.* Is it substantial in amount? If the traffic to and from the Pacific Coast, the Orient and other points is competitive, there is no question that it is enormous. Even eliminating the traffic of the Union Pacific moving over the Southern Pacific rails from Ogden to San Francisco, (which, however, cannot be done if any regard is to be paid to the practically undisputed testimony of hundreds of witnesses), the balance of the traffic is very great, as we have shown, and therefore there is no question about its being substantial. The position of the counsel for the defendants which was the view taken by the court below, was in substance that because the Union Pacific, with its own rails, does not reach the Atlantic Coast on the East, and because the larger part of its California traffic goes over the Ogden route of the Central Pacific, as a matter of law these lines were not and could not be competing lines as to that traffic. Mr. Loomis in his brief in the court below (p. 24) concisely stated defendants' position to be:

> "In determining the application of the Sherman Act to railroad consolidations it should be given a rational construction, and such construction can only be given by considering the railroads, (including the controlled lines), by *themselves, without reference to their connections.*"

As we have said, this was the position taken by the majority of the judges of the court below, for they held that the Union Pacific could not, as a matter of law be a competitor with the Southern Pacific as to California traffic, because it was only a link in the transportation, and further said that as to traffic between Portland and the Atlantic seaboard moving by the Union Pacific route and

in no part of its journey passing over the Southern Pacific rails, the two systems could not be competitors because the Union Pacific had to depend upon connections to transport the freight to or from Omaha and Kansas City and points in the East. (188 Fed. 111.) We respectfully submit that this position is not sustained by the authorities. In the first place, whether a railroad is a competing line with another and does actually compete for traffic, is a question of fact. Whether on a given state of facts the traffic so competed for is substantial enough to bring it within the inhibitions of the Sherman Act is a mixed question of law and fact. The majority of the court below placed its judgment as to the facts of this case in opposition to substantially every witness including the leading traffic men of this country, among whom were officers of the defendant companies, and other men equally familiar with the transcontinental situation. We believe it is a fair statement to say that the testimony is substantially undisputed that these lines were competing lines, and that they were actually competing prior to 1901 for the traffic which the court says could not be competitive. Upon a question which involves so many commercial conditions, the meaning and effect of competition, the effect of competition to certain terminal points upon all the other territory, and the competition between markets, it is surprising, to say the least, that the opinions of all railway traffic men and business men should be set aside in this case, and the court should hold that simply because the Union Pacific as to the larger part of its California traffic is a connecting line, as a matter of law it cannot be a competitive line of the Southern Pacific, although the Southern Pacific has four or five thousand miles of railway and steamship lines directly and actively competing with

the Union Pacific in the solicitation and handling of transcontinental business. The court took too narrow a view of the effect of competition. We believe, as was said by Judge Hook in his dissenting opinion that the court should take judicial knowledge that these great transcontinental systems are competing. Is it possible that the Union Pacific with its thousands of miles of railway and steamship lines reaching from the Missouri River to Portland and San Francisco, has no appreciable effect upon commerce in its competition with another complete system reaching the same general territory? Portland is a competitive market with San Francisco, Seattle and Tacoma. It appears undisputed, as shown by the testimony of Mr. Stubbs and Mr. Munroe, traffic officials of the Union and Southern Pacific roads, as well as other witnesses, that rates made to any one of the Pacific Coast terminals absolutely determine the rates to all. Mr. Stubbs said:

> "Let it (the rate) be cut on the Great Northern and it goes down to the Gulf of California."
> (Record, Vol. 5, Fol. 3498.)

This gave to either the Union Pacific or the Southern Pacific separately and independently the right to prevent an increase or force a decrease in transcontinental rates to and from all points East of the Missouri River, as according to the testimony of Mr. Munroe, chief traffic officer of the Union Pacific, the lines East of the Missouri River practically left the making of transcontinental rates to the lines West of the river; (Record Fols. 6829 & 30); and even in the absence of through tariffs, the rates West of the river are so high that any of the transcontinental lines could handle profitably business from the East on the sum of the locals. (Record Fols. 3709-11.)

The rule invoked by the court in this case is altogether too narrow. Upon this assumption the Great Northern, which only reaches (or did at the time this suit was brought) Seattle upon the coast, would not be a competitor of either the Union Pacific or Southern Pacific lines because the traffic carried by it, in order to reach the terminus of either of the others would have to pass over intervening rails. The view of the case taken by the court below that in order to be competitive, lines of road must reach common termini over their own rails, would give practically all the roads west of the Missouri River the right to consolidate, because, with the exception of the Southern Pacific none of them reach the Eastern seaboard over their own rails or boat lines, and this view, carried to its reasonable conclusion, would permit the consolidation of substantially all of the lines in the United States. The error of the court consists in holding not only that competitors must reach the termini over their own rails, between which they compete, but in addition, that the traffic which is competitive between them must originate on their own rails. That this was the view of the court below is shown by its repeated references to the fact that the Union Pacific on eastern business was dependent upon its connections, as it reached no further East than the Missouri River. This is not only contrary to the decisions of this court, and other courts to which we shall call attention, but is not supported by a single authority from any court in the United States. All of the lines between the Missouri River and the Pacific Ocean depend upon eastern connections for a large part of their traffic, yet they are competitors, as they admit in their answer in the Trans-Missouri case, as we have shown. If the Union Pacific can buy the Southern Pacific because they are connections as to a large amount of traffic, there is no

reason why either the Southern Pacific or Union Pacific cannot buy the Northern Pacific, because for a large amount of traffic in Washington, Montana, and other states, they are connections, and they only reach one common terminus. But it is said the Union Pacific road could not make a joint rate to and from California over its own line and the Central Pacific without the consent of the Southern Pacific, which owns the latter company. The answer to this is that neither could the Southern Pacific make a joint rate over the Central Pacific and the Union Pacific without the consent of the latter company. If there was a joint through rate, then the Union Pacific, as the testimony shows, had the same voice in making it as the Southern Pacific; and it appears in this case that there has always been a joint through rate, and Mr. Stubbs said that the Southern Pacific did not get as large a division of the same as he thought it ought to have, but got all it could. If there should be no joint rate and the through rate should be made up of the sum of the locals, then the Union Pacific could change its rate without the consent of anybody. As to all the great traffic to and from the Central States, the Southern Pacific, even using its Sunset route, could not make a joint rate without the assent of its connections. In any event the Union Pacific had a voice in making the rate to and from California points irrespective of its Portland line; such was the testimony and such has been the experience of railroad men from the beginning. If such a line of railway as the Union Pacific, with its thousand miles of rails is not a competitor of the other lines, it is impossible for any competition to exist between New York and the Pacific Coast, because all the routes, with the single exception of the Southern Pacific, are made by several

links joining. As to all traffic originating or terminating East of Chicago and West of the Atlantic seaboard, all routes, including the Southern Pacific are made up of the different transcontinental lines and their connections. If the view of the court below is correct, no competition as to all this enormous traffic is possible. No such rule, so far as we can find, has ever been laid down by any court previous to the decision of the court below. It is contrary to many decisions from which we quote at considerable length hereafter, and especially is contrary to the decision of this court in *Louisville & Nashville Railroad Co. v. Kentucky*, 161 U. S. 677. The competing lines in that case ran between Memphis and Louisville, but the traffic competed for was, as stated by the court at page 690:

> *"the through traffic from the lower Mississippi to Cincinnati."*

And again, at page 691:

> "that the lines proposed to be consolidated are parallel and competing is evident from an inspection of the map, since both connect the two important cities. Louisville and Memphis, which constitute their termini *and are natural competitors for the traffic from the southwestern to the northeastern states by way of Cincinnati as well as that in the opposite direction.*"

Thus we see that this traffic which was the subject of the competition rendering the acquisition of the Chesapeake, Ohio & Southwestern Railroad by the Louisville & Nashville illegal, was delivered to those lines by connections at one end and delivered by those lines to connections at the other end. They were both intermediate links as to the particular traffic, the competition for which this court held could not be stifled by a joint control. In the case of *Pearsall v. Great Northern Railway Co.*, 161 U. S., 646, it was

not only competitive business in Northern Minnesota, but *competitive transcontinental business* which this Court held would be affected by the proposed consolidation. The latter traffic was, of course, in the main delivered to the respective companies by their connections leading to the East from St. Paul. The testimony here is conclusive that both the Union Pacific and Southern Pacific were great factors in transcontinental rate-making during all the years they remained independent of each other. Furthermore the Interstate Commerce Commission can now order through joint rates. The considerations we have just adverted to involve only the matter of rate-making. As to that, we have shown under the facts and the law as laid down by this court, that these lines were competitors. But in addition, and perhaps even more important than the question of railroad rates, is the fact that competition includes furnishing good service, extension of lines into new territory, prompt settlement of claims and many other things.

Again, although the Union Pacific had a line from the Missouri River to San Francisco via Portland and its steamship line, still it was said by the court below (Record, Vol. XII., p. 301):

> "This detour through Portland and over the sea was long, unreliable and unsatisfactory, and afforded no opportunity for fair and remunerative competition with the Southern Pacific for San Francisco trade."

It is not the law that competition in order to be effective or substantial must be over lines of road of comparatively the same length each of which can be operated as economically or as efficiently as the other. Even Mr. Stubbs would not swear that this was an impracticable route, but rather as he called it, an "uninviting route." (Stubbs, Fol. 3293.)

The question is, therefore, is an uniting route not a competitive route? It is admitted by all railroad men that the length of water lines is not important. The Southern Pacific route from New York to San Francisco via its water lines and rail lines was 1,039 miles longer than the Union Pacific-Central Pacific line and connections, yet all the witnesses interrogated on the subject testified that they were actively competing for business. It appears that at times the Southern Pacific carried as high as 85% of the New York seaboard traffic. (Hawley Fols. 1419 & 20.) This Southern Pacific line to San Francisco via New Orleans is much longer than the Union Pacific with its eastern connections via Portland and its steamship line. The Santa Fe route is many miles longer to San Francisco than the Union Pacific—Central Pacific line, yet every witness who was asked the question, including Mr. Harriman, testified that these were competing lines. The Burlington-Rio Grande route from Omaha to Salt Lake is 300 miles longer than the Union Pacific, yet they are admittedly competitors. The steamship line from New York to New Orleans and thence to Colorado and Utah is much longer than the direct all rail route from New York to those states, or even the broken water and rail line through Newport News and yet at times 70% of the Utah business was shown to have gone over this New Orleans route. (Babcock Fol. 3942.) The Panama route, the route around the Horn, and the Hawaiian American line via the Isthmus of Tehuantepec are competing lines of very great potency. One cannot eliminate a competing line by a simple statement that it is a long line, and therefore cannot fairly compete with a shorter one. This would permit the short and effective lines between New York City and Chicago to consoli-

date with the so-called differential lines. As to such lines there has always been a passenger differential.

The court held that eliminating the large traffic from eastern points to California, the balance of the traffic for which these roads were acknowledged to be in active competition was so small and the territory affected so limited that the restraint of trade by the purchase of the Southern Pacific was not unreasonable. The position of the court below in this regard is clearly erroneous in this: instead of taking these two systems of railway and considering all phases of the competition, it took up each item of traffic and considered it alone and disconnected from all other items and held that the percentage of the earnings to the respective companies from such competitive traffic was not of itself of sufficient importance to render the suppression of competition in relation to it a violation of the Sherman Act. For instance, on page 305 of the opinion, (Vol. XII.), the court considered the competition between the Atlantic seaboard and the Middle States on the one hand, and Portland and Willamette Valley common points on the other, and said:

> "The route of the Southern Pacific for this business was by its own line via New Orleans and San Francisco to Portland, and that of the Union Pacific was by its own line from Omaha and Kansas City to Ogden, together with its connections and sub-connections eastward from Omaha and Kansas City, and its subsidiary lines, the Oregon Short Line and Oregon Railroad & Navigation Company running northwestwardly into Portland and the Valley. The geographical relation of these routes to each other, and the dependence of one of them, at least, upon voluntary arrangements with other lines, would seem to render natural and fair competition between them for the Portland trade im-

> possible; but the slight volume of the traffic here involved affords a controlling and decisive consideration. For the year ending June 30, 1900, the tonnage of the Southern Pacific Company in this trade was only 0.10 per cent of its total tonnage. For the same year the tonnage of the Union Pacific Company in this trade was only 0.46 per cent of its total tonnage."

To commence with, we have shown that these percentages are erroneous. There is omitted from this traffic a large amount of wool, hops and other traffic necessarily tributary to both lines, the earnings of which amount to many thousands of dollars a year. (Brief of facts, pp. 389 to 391.) But assuming the statement of the court to be correct, the effect of competition is not determined by the amount of traffic going in and out of the depot at Portland, and cannot be thus measured in dollars and cents. These figures include only the traffic which the waybills show passed into and out of the depot, while the rates to Portland governed the rates to the Pacific Coast terminal points, including San Francisco, Seattle, Los Angeles and San Diego. All of the vast country in Oregon and on the Coast would be affected by the competition of the Union Pacific road even if it stopped at Portland and had no steamship line to San Francisco. The testimony of defendants' chief traffic officer to that effect is not disputed. It is perfectly idle to attempt to measure the force and effect of competition by obtaining from railroads the tonnage in and out of their depots at common termini. Again, none of these figures as to earnings include passenger revenue but many witnesses said that passenger business was done on tickets at substantially equal rates over all Pacific lines and that round trip tickets were sold between the Pacific Coast and the East, valid over any one of the defendant

lines in one direction, and over any one of the others in the other direction; and it was shown by witnesses from New York to San Francisco that active competition existed as to passenger business; that it included not only first-class traffic but emigrant business; and even defendants' witnesses testified to the large passenger business between Portland and San Francisco and the competition therefor. Even though such computations as were made and commented on by the lower court were in any way decisive of this case, clearly they are not entitled to consideration when it appears that no passenger earnings are taken into account, and that as to freight traffic the figures are incomplete. After summing up the various items of freight traffic, excluding entirely the enormous California business the court figured up the total traffic alleged to be competitive, and said that it amounted to only 3.1% of the Union Pacific tonnage, and 88/100% of the Southern Pacific tonnage. On page 126 of Mr. Loomis' brief for the defendants in the court below, he stated that these items so competitive, amounted to 88/100% of the tonnage of the Southern Pacific and 1.25% of the entire revenue of that system, and that as to the Union Pacific it amounted to 3.19% of the tonnage and 3.90% of the entire revenue. His figures were made up by adding the percentages shown on defendants' own Exhibits. We have shown in our brief of the facts that certain items freight traffic were omitted therefrom, as well as all passenger traffic. The same argument was made in the Northern Securities case, where it was claimed, and we believe the proof showed that only 3% of the traffic was competitive, figuring it on a similar basis to the one defendants use in this case, but neither this court nor the circuit court were at all impressed by this argument.

The case of *Kimball v. Atchison, Topeka & Santa Fe.*, 46 Fed. 888, cited by the court below, in no way supports the conclusion of the court as applied to the facts of this case. It was claimed that to purchase the stock of the Frisco line was illegal because the Santa Fe had previously acquired control of a road known as the Colorado Road, but this latter road, which it was claimed was a competitor of the Frisco, was in reality, as stated by Judge Thayer in his opinion, only a suburban road. Between it and the Frisco there was interposed the Missouri Pacific through line, and not more than one per cent of the traffic of this suburban line which in the aggregate was infinitesimal when compared with the traffic over the Frisco, would in any event pass over the Frisco. Naturally the learned judge held that the ownership of this little suburban line, the competitive traffic of which was perfectly negligible, would not render illegal the acquisition of the Frisco.

Again, upon competing systems of railroad, much the larger part of the earnings is from local traffic, so that the actual tonnage which could have gone over the rails of either carrier from common termini is small in comparison, but the effect of the competition is broader. This is made very clear by Judge Hook in the dissenting opinion in the court below, and his illustration of the Mississippi River traffic and its influence on rates is particularly apt.

In the Trans-Missouri case each one of these lines west of the Missouri River was held to be a competitor with the other for the traffic there under consideration. The majority of these lines, like the Union Pacific and the Southern Pacific were simply links in the transportation.

In *Northern Securities Co. v. United States*, 193 U. S. 197, and *Harriman v. Northern Securities Co.*, 197 U. S. 244, this court held that not only were the Great Northern

and Northern Pacific competing lines, but that the Burlington and Northern Pacific were competing lines with the Union Pacific. In the latter case the court said (p. 297):

> "And it is clear enough that the delivery to complainants of a majority of the total Northern Pacific stock and a ratable distribution of the remaining assets to the other Securities stockholders would not only be in itself inequitable, but would directly contravene the object of the Sherman Law and the purposes of the Government suit. The Northern Pacific system taken in connection with the Burlington system, is competitive with the Union Pacific system, and it seems obvious to us, the entire record considered, that the decree sought by complainants would tend to smother that competition."

It was therefore held, and we do not understand it to be denied by the counsel in the case at bar, that the Burlington system was competitive with the Union Pacific; yet the Burlington connects with the Union Pacific at Omaha and Kansas City and is an important connection between those cities and St. Louis, Chicago, St. Paul and Minneapolis; in fact, substantially all of the great country lying between the Missouri River on the West and Chicago on the East, may be reached by the Union Pacific and the Burlington system as connections.

At the time of the decision in the Pearsall case (1895), the Northern Pacific and Great Northern were very important connections at many points, notably between Spokane and Portland, the latter company having no line south of Seattle and Spokane; also between St. Cloud, St. Paul and Minneapolis and South Dakota points and Sioux City, Iowa, and also between points in Minnesota and North Dakota and Winnipeg, and many other places, and it was

insisted in that case that the object of the agreement was the interchange of traffic between the lines.

The court said (p. 670):

> "It is true that upon its face the agreement contemplates principally an interchange of traffic between the lines under joint tariffs (by which is probably meant similar rates to be agreed upon between the parties), in order that the defendant may enjoy the right to ticket its passengers and consign its freight to points upon the line of the Northern Pacific, not reached by the Great Northern, and to that end is also to have the right to make use of the terminal facilities of the Northern Pacific at such points on the line as should be convenient to the defendant. If the sole object of this agreement were to facilitate an interchange of traffic, so that each road might enjoy the benefit of billing its passengers and freight to points on the other road, not reached by it, it would be difficult to foresee any objection to it. But the fact that one-half of the capital stock of the reorganized company is to be turned over to the shareholders of the Great Northern, which is, in turn, to guarantee the payment of the reorganized bonds, is evidence of the most cogent character to show that nothing less than a purchase of a controlling interest, and practically the absolute control, of the Northern Pacific is contemplated by the arrangement. With half of its capital stock already in its hands, the purchase of enough to make a majority would follow almost as a matter of course, and the mastership of the Northern Pacific would be assured."

In the case of *East Line & Red River R. Co. v. State* 75 Texas, 434, the Supreme Court of Texas had under consideration quo warranto proceedings, brought by the Attorney General in the name of the state, to forfeit the char-

ter rights of respondent road, on various grounds, one of which was "the sale of all its franchises, rights and privileges, together with all its stock, railroad buildings, depots, shops, tools, bonds, grounds and other property to the Missouri, Kansas and Texas Railway Company, a railroad corporation chartered under the laws of Kansas and controlling and operating a competing and parallel line of railway." It was also objected that the president, manager, superintendent and other officers and employes of the said parallel and competing road were in control of and managed and operated respondent's railroad. There was a special law of Texas under which the respondent was organized, which was amended by an act of May 17, 1873, which among other things declared "that said company shall not have the right to rent, sell, lease or consolidate with any parallel or competing railroad in this state." The Supreme Court quotes from the findings of fact of the lower court, subdivision 15a, as follows (p. 444.):

> "Disregarding their connections with other railroads and lines of transportation, the East Line and Red River and the Missouri, Kansas & Texas railroads were not competing roads when said sale was made. Considered with reference to such connections, they were competing roads."

And on page 446, the Supreme Court says:

> "We further concur with the court below in the holding that railways, by reason of their relations with, control, or management of other lines than their own, may become within the meaning of the law, competing lines, though the railways owned by them may not in fact connect."

See also *East Line & Red River R. Co. v. Rushing*, 69 Texas, 306, in which the Court said:

> "But as to whether they (the railway lines) were competing lines we could have no judicial knowledge whatever. Competition between railroads may exist, and yet their lines not run parallel, but cross each other at some point in their route. Hence, when a question as to such competition is raised, the court or jury must have proof upon the subject, as in case of any other fact submitted for its consideration."

The case of *State v. Vanderbilt,* 37 Ohio State 590, was an action in quo warranto to oust the defendants from their franchise to be a corporation known as the Ohio Railway Company. It appeared that said company was a consolidation of two other companies known as the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company and the Cincinnati, Hamilton & Dayton Railroad Company. The two latter companies had acquired by purchase and lease lines which were parallel and competing for the carriage of freight and passengers from the City of Cincinnati to Lake Erie. The Cleveland, Columbus, Cincinnati & Indianapolis Co. had a line extending in a Southwesterly direction from Cleveland to Springfield, a distance of 163 miles. The Cincinnati, Hamilton & Dayton Company had a line extending from Cincinnati in a Northeasterly direction to Dayton, a distance of about 60 miles. Through their respective leased connections the former road reached Cincinnati, and the latter reached Toledo on Lake Erie. At the southern terminus, to-wit: Cincinnati, the lines were competing for freight and passengers to Lake Erie and points beyond. At Toledo and Cleveland they were competitors for business to Dayton and Cincinnati and points further South. It will be observed that the two roads did not have the same northern terminus.

The consolidation was effected under the authority of a statute, reading as follows (p. 632):

> "When the lines of road of any railroad companies in this state, or any portion of such lines, have been or are being so constructed as to admit the passage of burden or passenger cars over any two or more of such roads continuously, without break or interruption, such companies may consolidate themselves into a single company."

The court gave judgment of ouster and based its decision upon two grounds: First, that upon the facts appearing in the case, the two companies consolidated did not come within the terms of the statute above quoted; and, second, that the two lines were parallel and competing and therefore could not be consolidated nor leased the one to the other.

Dealing with the first point, the Court entered upon an elaborate examination of the situation of each road with respect to its leased lines. It appeared that the southern terminus of the Cleveland, Columbus, Cincinnati & Indianapolis Co. was 24 miles from the northern terminus of the Cincinnati, Hamilton & Dayton Co. The claim was made that the distance between Springfield, the southern terminus of the former, and Dayton, the northern terminus of the latter, had been bridged by leased lines, which were made connecting at Dayton, so that it was possible to run trains continuously from Cincinnati to Cleveland over both roads and the leased lines mentioned. It was contended that when the statute authorized lines of road so constructed as to admit the passage of trains over any two or more of such roads continuously to be consolidated, it did not necessarily mean that such lines of road should be owned by the consolidating companies, but included leased lines as well.

The court considered the terms of the leases and found them to be in the nature of permanent leases. It should be noted also, as above stated, that the Cincinnati, Hamilton & Dayton Co., not only by means of leased lines extended from Dayton to Springfield, but also extended by means of leased lines to Toledo; and the Cleveland, Columbus, Cincinnati & Indianapolis Co. similarly extended by means of leased lines from Dayton to Cincinnati. It appeared, therefore, that while these lines were important connections to a large territory, they were competitive to another territory, and the court held they could not on that account be consolidated.

> "It is admitted in the agreed statement, 'that for many years last past, a very large commerce has existed between the portions of the United States lying southerly, southeasterly and southwesterly of Cincinnati on the one hand, and the regions conveniently reached by the commerce of Lake Erie, and of the great lakes connected therewith, on the other hand. That the course of this commerce has been such that goods, wares, and merchandise in large amounts have been brought to the city of Cincinnati by the transportation lines upon the Ohio River, and by the railroad lines converging at Cincinnati, and the same has been transported by the railroads running through the state of Ohio to points upon Lake Erie, and thence transported by the way of the lakes, and the railroads running from cities upon the lakes, to the Atlantic seaboard and the northwestern states. That owing to the great competition existing between the transportation lines upon Lake Erie, the rates of transportation of merchandise from either Cleveland, Sandusky, or Toledo to points upon the said great lakes, except Lake Erie, either easterly or westerly, from the said cities, have been generally the same to any one of such points, notwithstanding the difference

as to distance in favor of either of the said cities; so that merchandise going from either of said cities through the said lakes, and destined to any point, either upon the Atlantic seaboard or in the northwestern states, or any intermediate point east of and including Buffalo, generally paid the same rates for transportation upon the lakes, whether they were shipped from either Cleveland, Sandusky, or Toledo. That previous to the 8th day of July, 1881, there was an active competition between the aforesaid Cleveland, Columbus, Cincinnati and Indianapolis Railway Company and the aforesaid Cincinnati, Hamilton and Dayton Railroad Company in respect to the said transportation business from Cincinnati to points upon Lake Erie, and great rivalry existed as to the obtaining and conducting of such transportation business. That the said railroad companies respectively connected the said city of Cincinnati with the ports of Cleveland and Toledo on Lake Erie.

"The Cleveland, Columbus, Cincinnati and Indianapolis Railway, and the Cincinnati, Hamilton and Dayton Railroad, with their leased lines, constitute two great arteries of trade, both commencing on the Ohio river at Cincinnati, meeting at Dayton, and extending thence to Lake Erie, one terminating at Cleveland and the other at Toledo. The attorney general says, and the record supports the statement, that these roads are 'for sixty miles lying parallel and near to each other.' That they are, indeed, in the largest sense, parallel and competing roads, seems to be beyond dispute, and it may be fairly inferred from the record that a leading object in making the consolidation was to destroy that competition. That being true, the lines of these roads are not, in my judgment, 'so constructed as to admit the passage of burden or passenger cars over two or more of such roads continuously,' within the proper meaning of section 3379. That the mere physical ability to pass cars from one road to the other satisfies the statute, is a construc-

tion of it which is wholly inadmissible, for the provision requiring such connection would be without meaning. In imposing that restriction upon consolidation, the legislature intended, not merely that the physical fact should exist, but that such consolidation should only be made for the very purpose of passing freight and passengers over both lines, or some material parts thereof, not necessarily in a direct or straight line, but *continuously*. * * *

"Having regard to the language of this statute, in the light of such aids as are here indicated, I am satisfied the legislature never intended that railroads situated as these are should be regarded as constructed for the carriage of freight and passengers *continuously*, in the manner contemplated by the section. Indeed, each of these consolidating companies had a line for the carriage of freight and passengers from Cincinnati to Lake Erie, 'continuously, without break or interruption,' and the policy of the country in general, indicated in constitutional and statutory provisions, has long been opposed to the consolidation of roads bearing such relation to each other, and this strengthens the belief that these companies are not within the section in question. Consolidation for the transportation of freight and passengers continuously, is a thing which the legislature might well desire to encourage, as it may be advantageous alike to the public and the companies; but corporations have power only as granted by the general assembly; and where companies situated as these are, being parallel and competing, claim that authority to consolidate has been granted to them, they must be able to point to words in the statute which admit of no other reasonable construction, for it will not be assumed that the law-making power has authorized the creation of a monopoly so detrimental to the public interest. But the statute contains no such words."—(Pp. 641-644).

Referring to the State statute passed in 1873, prohibiting one company from leasing to another where their lines are competing, the Court said (p. 645):

> "But the policy of the state, as declared in that enactment, cannot be in doubt. Since 1873, at least, there can be no lease where the lines of the lessor and lessee are competing, and it is admitted that if there can be no lease, there can be no consolidation of such lines leased since then."

It will be noted that this case was cited approvingly and quoted from by this Court in the case of *Louisville & Nashville R. R. v. Kentucky*, 161 U. S. 677, from which we quoted above. These cases are very instructive upon the subject of suppressing competition between lines which are naturally competitive, and completely answer the novel doctrine announced by the Court below that railways must be considered without reference to their connections in determining whether or not they are competing.

See also the same case in the Supreme Court of Kentucky, 97 Ky., 675. It was there claimed that part of the Chesapeake, Ohio & Southwestern was a connection or branch line of the Louisville & Nashville.

We call the court's attention particularly to the description of these lines in the decision of the Supreme Court of Kentucky, for it illustrates the fact that while there were many points of such competition, the lines as entireties were not competitive. Portions of the Chesapeake, Ohio & Southwestern were valuable connections of the Louisville & Nashville. So in the case at bar. The Central Pacific line from Ogden to San Francisco is a connection of the Union Pacific and might have been acquired as such until the Southern Pacific acquired and made it a part of its

system. The Central Pacific Line to San Francisco considered by itself is a valuable connection, but practically the whole Southern Pacific system is competitive with the Union Pacific and the fact that the Central Pacific is a connection, does not empower the Union Pacific to buy the Southern Pacific with all its thousands of miles of competing lines. Consider for a moment the points at which competition exists—between San Francisco and Portland, between Portland and Ogden, between the Atlantic seaboard and Colorado and Utah common points, between Portland and San Francisco and Montana, between the territory east of the Missouri river and Portland and vicinity, between these eastern points and the Orient, besides the competition between all eastern points and other Pacific Coast points via the two lines. It is not an answer to the inhibition of the Sherman Act that some of these Southern Pacific lines may be valuable connections of the Union Pacific. It is undoubtedly for the financial profit of the Union Pacific to control not only the Central Pacific line, its direct connection to San Francisco, but all the other lines of the Southern Pacific, but neither its desire nor the power thereby created is any answer to the prohibitions of the statute. In the Northern Securities case, 193 U. S., Mr. Justice Harlan, at page 352 said:

> "The combination here in question may have been for the pecuniary benefit of those who formed or caused it to be formed, but the interests of private persons and corporations cannot be made paramount to the interests of the general public."

The case of *State v. Montana Ry. Co. et al.*, 21 Mont. 221, was an action instituted upon the relation of the Attorney General to have declared invalid a certain

lease entered into between the Montana Railway Company and the Butte, Anaconda & Pacific Railway Company. Both of these companies were organized under the laws of Montana and operated railroads in that state. The lease in question was to run for ten years at an annual rental payable in monthly installments. By its terms the Butte, Anaconda & Pacific Co. was to control and operate the Montana Company during the term of the lease. Certain traffic rights of the Oregon Short Line and of the Northern Pacific over the leased line were saved.

It further appeared that while the railways involved were separate corporations, the stock of the Montana Railway Co. was controlled by the Northern Pacific Co. The Butte, Anaconda & Pacific Co. started from Butte and ran to Anaconda; The Montana Railway Co. ran from Stuart to Anaconda; and another line whose stock was owned by the Northern Pacific, to-wit: the Montana Union Company, ran from Butte, practically paralleling the Butte, Anaconda & Pacific for a distance of about 14 miles, and the station of Stuart on the Montana Union was about three miles from where that line and the Butte, Anaconda & Pacific began to diverge. The Montana Railway and the Butte, Anaconda & Pacific had one common terminus, the city of Anaconda. Their other termini were Stuart on the Montana Union, and Butte on the Butte, Anaconda and Pacific. Stuart was from 2½ to 3 miles from the nearest point on the Butte, Anaconda & Pacific. It was admitted that the Montana Railway Company and the Butte, Anaconda & Pacific were connected at Anaconda, and that the shortest route from Butte via Anaconda to Stuart and stations on the Montana Union Line, north of Stuart, and all stations on the Northern Pacific main line, was by way of the Butte, Anaconda

& Pacific to Anaconda, and thence to Stuart by the Montana Railway, and thence northerly via the Montana Union.

The State contended in this action that the Butte, Anaconda & Pacific and the Montana Railway were parallel and competing, and therefore that the lease of the latter to the former was prohibited by the Constitution and ultra vires of the corporation. The defendants contended: First, That the lines were not parallel or competing, but were continuous and connecting lines; and, Second, That in any event the lease was valid and involved the exercise only of powers granted by the laws of Montana under which the corporations were organized.

The constitutional provision referred to was as follows:

> "No railroad corporation, or the lessees or managers thereof, shall consolidate its stock, property or franchise, with any other railroad corporation, owning or having under its control a parallel or competing line; neither shall it in any manner unite its business or earnings with the business or earnings of any other railroad corporation, nor shall any officer of such railroad company act as an officer of any other railroad company owning or having control of a parallel or competing line. Const., Art. 15, Sec. 6." (21 Mont. 228.)

There were certain statutory provisions apparently executing the constitutional provision, but the later law conferred upon railroads the right to lease other roads without regard to whether such roads were parallel or competing or continuous or connected, thereby impliedly repealing the earlier statutes on the subject.

On the subject of whether the lessor and lessee were parallel and competing lines the Court held that they were. The Court said (p. 234):

"We now directly meet the recurrent questions: Are the roads of the Butte, Anaconda & Pacific and the Montana Railway Companies parallel or competing lines, and, if they are, may they contract by lease? *The true rule is that whether two railroads are parallel or competing is a question of fact—of physical fact.* Actual mathematical parallelism is easily demonstrable by engineers' maps of surveys and calculations. Exact parallelism, however, is not what is included in the meaning of the words of the constitution forbidding the consolidation of parallel railroads. A reasonable construction must obtain. In a mountainous country it is well-nigh impossible to conceive of two railroads running any distance precisely equidistant at all points. We should say that by parallel railroads are meant railroads running in one general direction, traversing the same section of country, and running within a few miles of one another throughout their respective routes. *They may or may not be competing. That depends upon their termini and their commands of traffic. Railroad Co. v. Kentucky,* 161 U. S. 677, 16 Sup. Ct. 714. Independently of the Montana Union Railroad, the Montana Railway cannot be said to be a parallel line to the Butte, Anaconda & Pacific between Butte and Anaconda. One of the principal terminal points of the Montana Railway line is Stuart, on the line of the Montana Union, while one of the principal termina. points of the Butte, Anaconda & Pacific is Butte Anaconda is the other principal terminal point of each. From Stuart to Anaconda, though a distance of about 12 miles, there is a substantial parallelism in their routes. Still, we think, it is doubtful whether the Montana Railway is a parallel line of the Butte, Anaconda & Pacific in a sense that would prevent its union with the Butte, Anaconda & Pacific, if such consolidation or union were attempted under the law. But, passing that question without decision of it, are they competing lines of railway? Here again, if we take the separate corporation, the

Montana Railway Company, and its railroad line as an independent one, and examine the maps and consider the section through which the roads run, we find there could be no substantial competition with the Butte, Anaconda & Pacific, for the reason that the traffic between Stuart and Anaconda on the Montana Railway, and that point on the Butte, Anaconda & Pacific nearest to Stuart and between such point and Anaconda, and between intermediate points and Anaconda, is entirely insignificant, as there are no towns or freight stations, to furnish business sufficient to make such competition along the lines of the two roads between such points and the city of Anaconda. Whether lines of road are competitive or not depends upon the business of the companies, the conduct of the roads by their authorities, their channels of traffic, and generally —nearly always—upon whether the roads extend for transportation from and to the same points along their routes. Strictly speaking, the line of road of the Montana Railway Company consists of the road —the superstructure—over which it operates its trains in the exercise of its franchise, and none other. From an exact standpoint it is limited in its railroad operation to the few miles of rails and other property belonging to its own corporation, inasmuch as it neither controls nor operates other roads by lease, ownership, consolidation, or otherwise. Thus literally regarding the situation, there could be no competition between the Montana Railway and the Butte, Anaconda & Pacific lines.

"But a majority of the court prefer to adopt what we think to be a more practical way of looking upon this branch of the case, and to consider the constitution as comprehending by competing lines not only railroads which run between the same two principal points on their own lines, but those which, having one common terminus, yet are actually connected with other railroads, and which, by arrangements with such other railroads concerning the transportation of freight and passengers, are so related to one another

in fact as to give them the opportunity by geographical situation to directly cut rates to principal or terminal points. *Railway Co. v. State*, 75 Tex. 434, 12 S. W. 690."

In the case of *East St. Louis Connecting Ry. v. Jarvis*, 92 Fed. 735, the opinion of the Circuit Court of Appeals of the Seventh Circuit was written by Judge Jenkins. The question there was as to whether two belt line roads at East St. Louis were parallel and competing lines within the provision of the constitution of Illinois which reads as follows:

"No railroad corporation shall consolidate its stock, property or franchise with any other railroad corporation owning a parallel or competing line."

On page 742 Judge Jenkins says:

"We cannot doubt that these lines are 'parallel lines' within the meaning and intent of the constitutional provision. The term 'parallel' is not employed in the constitution in its merely geographical sense. It does not mean two lines of railway that are equidistant from each other. That would be a narrow construction of the constitutional provision which would defeat its purpose. It means lines of railway having the same general direction and therefore likely to come in competition with each other. We also think it clear, upon the evidence and from the charters of the companies, that they were, and were designed to be, competing lines of railway. * * * Necessarily they would compete with each other with respect to the transfer to the ferry companies, of cars coming to East St. Louis over the lines of any railway which they both crossed. It is true that, with respect to certain lŏcal industries, they were not competing, because both had not access to them; but the principal business designed was the transfer of through traffic to the city

> of St. Louis, and the one company, in connection with the ferry companies with which it connected, was the competitor of the other. * * * The evidence of the case also clearly demonstrates the fact. It appears that in the year 1884 these two companies were cutting rates, buying business, and losing money, and, upon the advice of a mutual friend, not then connected with either company or with either of the ferry companies, the two companies concluded to put the two properties under the same management, and as a result the leases in question were made."

In *Texas & Pacific Ry. Co. v. Southern Pacific Ry. Co.*, 41 La. An. 970 (S. C. 17 Am. St. Rep. 445), the court considered an agreement made between C. P. Huntington, representing the Southern Pacific Railway Company, and certain other companies, and Jay Gould, representing the Texas and Pacific Railway Company and certain other companies, which pooled the earnings of these roads. The Southern Pacific ceased to recognize the claims for excess earnings, under this arrangement, and when sued pleaded in defense: First, that, the contract was illegal, being a pool between competing railroads; second, that, it was forbidden by the constitution of Texas; and, third, that, if it was ever valid, it was terminated by the Interstate Commerce Law which went into effect April 3, 1887.

It appeared that the business which was pooled was between El Paso and New Orleans. Each of these systems had lines extending through between these points, which were made up of short lines, included in which was a line ninety miles east of El Paso, and a short line between Galveston and Houston, which was used in common as parts of the through lines. It appeared that, as stated in the opinion, at certain points, both in Texas and Louisiana, the respective lines of the plaintiff and the defendant

system of roads, were very far apart so that there could be no pretense that they were parallel. But it did appear that, for the traffic between New Orleans and El Paso and Galveston, they were competing lines. The Court then used this language (p. 980):

> "It cannot be doubted that shippers who desired, without the existence of the agreement contained in article 6, to consign goods either from El Paso to New Orleans, or the reverse, or from Galveston to El Paso or the reverse, had the option to select either of the two lines in accordance with the most favorable terms which he could obtain from either. He would then have had the advantage of the natural competition existing between the two rival systems. But, under the effect of the arrangement now under discussion, the shipper could derive no advantage as a result of his choice between the two, as the terms would be the same with either or both. It is therefore too clear for further argument or illustration that the first, the lasting, and the inevitable, result of the agreement to the public was to stifle competition, and, as competition is the life of trade, the effect of the contract must necessarily and inevitably have been injurious to public interests, and hence it was contrary to public policy."

III.

THE CLAUSE IN THE PACIFIC RAILROAD ACT AUTHORIZING THE CENTRAL PACIFIC AND THE UNION PACIFIC TO CONSOLIDATE THEIR LINES GAVE THE UNION PACIFIC NO RIGHT TO BUY THE SOUTHERN PACIFIC.

We do not understand that the defendants claim any right under the Pacific Railroad Act to consolidate the Union Pacific and Southern Pacific lines, and we are in doubt as to what effect the court below gave to that Act. In the first place the Central Pacific Railroad Company is a separate railway corporation which purchased in 1899 from the California corporation known as the Central Pacific Railroad Company the line from San Francisco to Ogden. This line had been built as far West as Sacramento by the Central Pacific and it had acquired the balance into San Francisco and was also the owner of the line running North to the California and Oregon boundary, and also certain other lines in California. The stock of this present company is owned by the Southern Pacific Company. The only right of consolidation which ever existed was with the Central Pacific Railroad Company and as to the line to San Francisco. Of course, even if it extended beyond this, the passage of the Sherman Act before the exercise of the right would repeal it.

> *Pearsall v. Great Northern R'y*, 161 U. S. 646;
> *Louisville & Nashville R'y v. Kentucky*, 161 U. S. 677.

It certainly gave the Union Pacific no right to own the stock of, or consolidate with the Southern Pacific. But it

is claimed that Section 15 of the Act of 1864, being a part of the charter of the Union Pacific, in no way prevents the Central Pacific from discriminating against the Union Pacific. The clause of the charter is as follows (13 Stats. at L. 362):

> "That the several companies authorized to construct the aforesaid roads are hereby required to operate and use said roads and telegraph for all purposes of communication, travel and transportation, so far as the public and the government are concerned, as one continuous line; and in such operation and use to afford and secure to each equal advantages and facilities as to rates, time and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others."

It really makes no difference to this case whether this clause has any effect or not, because if the Southern Pacific refused to make through joint rates with the Union Pacific, the Union Pacific had its own line, which the testimony clearly shows was ample to protect it, and the Southern Pacific could not make a rate over the Union Pacific without its consent. If the Southern Pacific could withdraw its business and ship it by New Orleans instead of via the Union Pacific, this shows all the more that it is a competing line. It appears by the testimony of Mr. Stubbs, as we said before, that he did not think the division of the rate between the Union Pacific and the Central Pacific on California business was fair to the Central Pacific prior to 1901, but he said it was all they could get; that is, the Union Pacific was so powerful that the Southern Pacific could not force a greater division. (Fol. 3320.) If it is true that the Southern Pacific had the Union Pacific "bottled up," as the Court says, at Ogden, so that it was powerless and could not compete for California business, it is

strange, to say the least, that none of the witnesses in this case discovered such a condition, and that Mr. Stubbs, an exceedingly able traffic man, could not get a greater division. The testimony is overwhelming against the Court's conclusion. The Union Pacific was a competitor because it owned a complete line to the Pacific. It thus possessed full power to make transcontinental rates as shown in our brief of the facts. It was a link of a thousand miles in another line, with the Central Pacific, and had the same voice in making the rates as the latter. But it is evident that the effect of the Act of 1864 is broader than claimed by the defendants and found by the Court. If the construction placed upon this statute by the defendants is correct, it had no effect whatever, and yet the charter under which the Central Pacific and Union Pacific were built provides that in such operation and use they shall afford and secure to each "equal advantages and facilities as to rates, time and transportation without any discrimination of any kind in favor of the road or business of any or either of said companies or adverse to the road or business of any or either of the others." A more general provision than this was enforced in the case of the *Mason City & Fort Dodge Railroad Co. v. Union Pacific Railroad Co.*, 199 U. S. 160. (See also *Joy v. St. Louis* and other cases cited in the foregoing case.) The only provision of the Interstate Commerce Act prior to 1901 was that "railroads shall not discriminate in their rates and charges between such connecting lines." But here the language is specific, providing affirmatively that they are to "afford and secure to each equal advantages and facilities as to rates, time and transportation without any discrimination of any kind," etc. Under this provision the Central Pacific could not give the Rio Grande a different rate than

it gave the Union Pacific. It could not afford it any advantages and facilities as to rates, time and transportation that it did not afford the Union Pacific. Furthermore, as we have noted, at the present time the Commission has power to compel roads to make joint rates.

If the court could not, at the time of the merger, compel the making of joint rates, it certainly could, by injunction, prevent the Central Pacific or the Southern Pacific, its lessee, from making joint rates with the Rio Grande while refusing the same to the Union Pacific, and from in any other way preferring the Rio Grande or any other rival.

IV.

THE ACQUISITION OF THE CONTROLLING INTEREST IN THE SOUTHERN PACIFIC SYSTEM BY THE UNION PACIFIC TENDED TO SUPPRESS COMPETITION, AND THEREFORE WAS IN RESTRAINT OF TRADE, ALSO TENDED TO MONOPOLY AND IS IN VIOLATION OF THE SHERMAN ACT.

Northern Securities Co. v. United States, 193 U. S. 197;

Harriman v. Northern Securities Co., 197 U. S. 244;

United States v. Am. Tobacco Co., 221 U. S. 106.

The foregoing cases are conclusive, if these lines are in their broader sense competing for any considerable traffic, or as to any considerable territory. That they are, we think has been demonstrated beyond question. But it may be claimed that the Northern Securities case is not controlling because in that case the stocks of the two companies were placed in the Northern Securities Company as a holding company, suppressing the competition between the two lines, while here one company owns the stock of the other. Any such attempted distinction between the two methods was effectually disposed of in the case of *Harriman v. the Northern Securities Company*, in which the Court held that to turn back to the Union Pacific the majority of the stock of the Northern Pacific, carrying with it the control of the Burlington, would be in violation of the Sherman Act; in other words, that the Union Pacific could not directly own

and control the majority of the stock of the Northern Pacific or of the Burlington. Furthermore, the Court said in the Harriman case that what had been done was in effect a sale of the stock to the Northern Securities Company. It needs no argument to show that if the holding by the Northern Securities Company of the title to the majority of the stock of the competing systems would suppress competition and tend to monopoly, then the holding by one of the companies of the title to the majority of the stock of the other would have the same effect. We must remember that it is the suppression of competition and the acquiring of a monopoly which is inhibited by the Sherman Act. Of course, it is immaterial that the Union Pacific controls the Southern Pacific through the Oregon Short Line, the stock of which latter company it owns and controls.

Pennsylvania R. Co. v. Commonwealth, 7 Atl. Rep. 374; (not officially reported).

Stockton v. Central R. R. Co., 50 N. J. Eq. 52.

If any doubt ever existed as to this point it has been removed by the decision in the Tobacco case, where the Court held the form of the acquisition immaterial.

It is not denied that by the ownership of 46 per cent of the stock of the Southern Pacific, the Union Pacific absolutely controls that company, but in any event the testimony is plenary on this subject. It appears that the Union Pacific or its subsidiary the Oregon Short Line has voted the majority of the stock present at all meetings of stockholders since 1903; that it has elected the directors and officers, most of which are common; that the roads have common presidents, traffic officials, superintendents, and managers, and that they have consolidated all but two or

three of their commercial agencies. They are operated now as one system and substantially all competition is eliminated.

Furthermore, it appears by the testimony and is a well known fact that one holding less than a majority of the stock of a large railway company, and having possession of the transfer books, can easily control the railroad, for the reason that such stock is widely scattered, the full amount is never voted and the officers are in position to procure proxies and thus vote stock enough to control at meetings. A large amount of the stock is not in fact represented at such meetings and hence less than a majority of the whole constitutes a majority of that present. Mr. Kahn testified that ordinarily thirty per cent is enough to constitute a dominating influence. (Fol. 2040.)

V.

THE OWNERSHIP BY THE UNION PACIFIC OF LESS THAN A MAJORITY OF STOCK IN THE SOUTHERN PACIFIC, SANTA FE, NORTHERN PACIFIC, GREAT NORTHERN AND SAN PEDRO LINES TENDED TO SUPPRESS COMPETITION AND CREATE A MONOPOLY AND IS INHIBITED BY THE SHERMAN ACT.

We have already called attention to the fact that the acquisition of the control of the stock of one road by a competing line is illegal under the Sherman Act, because it tends to monopoly and to the suppression of competition, and is against the public policy of the nation. This leads to the inevitable conclusion that, as *any* attempt to monopolize or to suppress competition in any degree is illegal, any purchase of stock which lessens the interest of the parties to compete is equally against public policy. The law does not compel railroads to compete, but it prohibits them from making any contract or combination, or entering into any conspiracy, or forming any trust *which takes away the motive or incentive to compete*. It is unlawful as well because it tends to monopoly as upon the ground that it is in restraint of trade, for that which tends to restrain competition tends to monopoly.

The Northern Securities case was decided on the ground that the control of both roads tended to monopoly, as well as to the restraint of trade. In the opinion of Mr. Justice Harlan affirming the decree in the Northern Securities case, he stated the issue as follows (p. 320):

> "Is the case as presented by the pleadings and the evidence one of a combination or a conspiracy in restraint of trade or commerce among the States, or with

foreign states? *Is it one in which the defendants are properly chargeable with monopolizing or attempting to monopolize any part of such trade or commerce?"*

In summing up the evidence he declared (p. 325):

"In our judgment, the evidence fully sustains the material allegations of the bill, and shows a violation of the act of Congress, in so far as it declares illegal every combination or conspiracy in restraint of commerce among the several States and with foreign nations, *and forbids attempts to monopolize such commerce or any part of it.*"

Again (p. 332) the Court said:

"That to vitiate a combination, such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition."

Mr. Justice Brewer, in concurring, said (p. 363):

"It must also be remembered that under present conditions a single railroad is, if not a legal, largely a practical, monopoly, and the arrangement by which the control of these two competing roads was merged in a single corporation broadens and extends such monopoly."

In the case of *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, the Great Northern did not buy the majority of the stock of the Northern Pacific, but the contract pro-

vided that one-half of the stock was to go to the shareholders of the Great Northern, and there was an alternative provision that the transfer might be made to a trustee for the use of the stockholders of the Great Northern. The Court said (p. 672):

> "Under the proposed arrangement however, the Northern Pacific as a company, in return for a guaranty, which the individual stockholders could not give, turns over to a trustee for the entire body of stockholders of the Great Northern one-half of its stock, with the almost certainty of the latter securing the complete control, and probably the ultimate amalgamation, of the two companies. If such amalgamation were once effected, it would in all probability be final.
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> * * * * * * *
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> "The consolidation of these two great corporations will unavoidably result in giving to the defendant a monopoly of all traffic in the northern half of the State of Minnesota, as well as of all transcontinental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection. The acts of the Minnesota legislature of 1874 and 1881 undoubtedly reflected the general sentiment of the public, that their best security is in competition." (p. 677)

Here, again, the Court did not wait for a complete monopoly, but enjoined acts tending to a monopoly.

In the case of *Stockton v. Central R. Co.*, the Court placed the illegality of the lease on the ground that it tended to monopoly. The Court said (p. 81):

> "By this lease only one competitor is silenced, and only a little more than one-half of the entire coal region is controlled. It is only the second step in the direction of monopoly, the first being the lease of the Lehigh Valley Railroad. It is to be remembered,

> however, that the attorney general may have his injunction when the ultra vires act tends, or is of a nature, to produce public injury. He is not required to wait until all the monopoly possible is created, or until all the injury possible is in process of infliction."

In the case at bar we have seen that by the acquisition of less than a majority the Union Pacific absolutely controls the Southern Pacific. As shown in the brief of facts, the Union Pacific secured the election of two of its directors as directors of the Santa Fe, certain of the Union Pacific directors being the owners of a large amount of Sante Fe stock and the Union Pacific itself also purchased ten million dollars of the same stock, since which time they have been acting in harmony as to rates, in the division of traffic, in joining their lines of railroad in California under one corporation and in abstaining from entering each other's territory and carrying out this policy by the transfer of a competitive road in Arizona from the Santa Fe to the Southern Pacific. The Union Pacific also acquired half of the stock of the San Pedro and throttled that competitor. In its far reaching plans for the suppression of competition, it endeavored to prevent the construction by competitors of railroads for the development of Oregon, while failing to build such necessary lines itself; it shut off to a great extent the competition of the Denver & Rio Grande, and endeavored to secure a half interest in the control of the stock of that company; by these means, added to its attempt to control the Northern Pacific, it sought dominion over transportation in more than half of the territory of the United States.

The inhibitions of the Sherman Act are directed not only against complete restraint of trade or complete monopoly, but against any attempt to monopolize, and any contract or

combination which tends to monopoly is illegal. In public service corporations anything which tends to suppress free competition in any degree has been held illegal by this court.

United States v. Trans Missouri Freight Association, 166 U. S. 290;

Loewe v. Lawlor, 208 U. S. 274;

Northern Securities Co. v. United States, 193 U. S. 197-411.

In the Northern Securities case, the court said (p 332):

> "But it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition."

In the Trans-Missouri Freight Association case, Mr. Justice Peckham quoted with approval from the case of *Gibbs v. Consolidated Gas Co.*, 130 U. S. at p. 408, as follows:

> "The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683; *Shephard v. Milwaukee Gas Co.*, 6 Wisconsin 539; *Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co.*, 121 Illinois 530; *St. Louis v. St. Louis Gas Light Co.*, 70 Missouri 69. Hence, while it is justly urged that those rules which say that a given contract is against public policy, should not be arbitrarily extended so as to interfere with the freedom of contract, *Printing, &c. Registering Co. v. Sampson*, L. R. 19 Eq. 462,

yet in the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy. This subject is much considered, and the authorities cited in *West Virginia Transportation Co. v. Ohio River Pipe Line Co.*, 22 West Va. 600; *Chicago, &c. Gas Co. v. People's Gas Co.*, 121 Illinois 530; *Western Union Telegraph Co. v. American Union Telegraph Co.*, 65 Georgia 160."

In the case of *United States v. Standard Oil Co.*, 173 Fed. 179, Judge Sanborn writing the opinion of the court said:

"The exchange of the stock or shares in the ownership of competitive corporations engaged in interstate or international commerce for stock or shares in the ownership of a single corporation, the necessary effect of which is a direct and substantial restriction of competition in that commerce, constitutes a combination in restraint of commerce among the states or with foreign nations that is declared illegal by this law."

Again on page 179, he said:

"If the necessary effect of a contract, combination, or conspiracy is to stifle, or directly and substantially to restrict, free competition in commerce among the states or with foreign nations, it is a contract, combination, or conspiracy in restraint of that trade, and it violates this law. The parties to it are presumed to intend the inevitable result of their acts, *and neither their actual intent nor the reasonableness of the restraint imposed may withdraw it from the denunciation of the statute.*"

The foregoing language was in no way limited by the decision of this Court on appeal (221 U. S. 1).

In the case of *Louisville & Nashville R. Co. v. Kentucky*, 161 U. S. 677, the constitution of Kentucky provided that:

> "No railroad * * * shall consolidate its capital stock, franchises or property, or pool its earnings, in whole or in part, with any other railroad * * * owning a parallel or competing line."

The Louisville & Nashville bought a major portion of the stock of a competing line. The court said (p. 697):

> "We think that the principle of these cases applies to the power of the legislature to forbid the consolidation of parallel or competing lines, whenever, in its opinion, such consolidation is calculated to affect injuriously the public interests. Not only is the purchase of stock in another company beyond the power of a railroad corporation in the absence of an express stipulation in the charter, *but the purchase of such stock in a rival and competing line is held to be contrary to public policy and void. Cook on Stockholders*, § 315; *Central Railroad Co. v. Collins*, 40 Georgia 582; *Hazlehurst v. Savannah &c. Railroad Co.*, 43 Georgia 13; *Elkins v. Camden & Atlantic Railroad Co.*, 36 N. J. Eq. 5. The doctrine is peculiarly applicable to this case, in which it is shown that the Chesapeake Co. was largely aided in its construction by contributions from municipalities along its line for the very purpose of obtaining competition with the L. & N. Co.—a purpose which would, of course, be defeated by a combination with it. This restriction upon the unlimited power to consolidate with other roads is not, as the plaintiff in error suggests, called for by any new view of commercial policy, but in virtue of a settled policy which has obtained in Kentucky since 1858, in Minnesota since 1874, in Ohio since 1851, in New Hampshire since 1867, and by more recent enactments in some dozen other States—a policy which has not only found a place in the statute law of such states as apprehended evil effects from such consolidations, *but*

> *has been declared by the courts to be necessary to protect the public from the establishment of monopolies.* Indeed, the unanimity with which the States have legislated against the consolidation of competing lines shows that it is not the result of a local prejudice, but of a general sentiment that such monopolies are reprehensible." (Italics are ours).

In the case of *The Central R. Co. v. Collins,* 40 Ga. 583, the Central Railroad & Banking Company, chartered to build and maintain a railroad from Savannah to Macon, and the Southwestern Railroad Company, chartered to build and maintain a road from Macon to Chattanooga River, were about to purchase from the City of Savannah 12,383 shares of stock in the Atlantic & Gulf Railroad, being less than a majority of the stock of the Atlantic & Gulf Railroad, chartered to build a road from Savannah to Bainbridge. The road so sought to be purchased was, to some extent at least, a competing line with the Central Railroad and the Southwestern Railroad. The question as to the legality of the purchase was considered on two grounds: First, whether the contract was ultra vires the chartered powers of the purchasing company; and, second, whether it was a purchase of stock in a competing road and therefore against the public policy of the state and void. The court stated (p. 617):

> "The real question in this case is as to the *power* of these two companies under their charters, each of which defines the object of the incorporation to undertake the management of not only a wholly new enterprise from that set forth in the charter, but an enterprise chartered by the Legislature evidently *in rivalry with these two roads."*

Considering the second proposition, the court said (p. 629):

> "It is, therefore, a pertinent question in this case whether it is or is not contrary to public policy that the Central Railroad Company shall be permitted to obtain *such an interest* in the Atlantic & Gulf Railroad as is contemplated by this purchase."

It appeared all through the case that the company did not contemplate purchasing a majority, but it was held to be contrary to public policy for it to purchase a minority as it tended to monopoly. The court further said (p. 630):

> "A colossal enterprise, assured of handsome dividends by the possession of a monopoly, may well rest upon its position, knowing that however the country may suffer from its exactions, its own profits are secure. It is the rivalry of opposing interests, the struggle for success, nay, even for life, with dangerous opposition, that gives life, enterprise and success to railroads as to other human undertaking. It has been the conflict with thirty State lines, each with its opposing interests, and with numerous seaboard cities, each seeking to attract the rich outpourings from the great interior that has begotten the mighty net work of iron which interlaces our extensive territory, and I am convinced that there is no public policy more striking than that which, whilst it fosters every such undertaking, is yet careful ever to keep in view the danger of a monopoly, and the good effect of rivalry and conflict between different companies. The Central Railroad is and has long been, the pride of Georgia. The skill, energy and prudence with which its affairs have been managed, reflect great credit upon the men who have had these affairs in their control, and the State may well be grateful for the success that has followed. Yet, we cannot but think it would be a measure fraught with great public evil to give to that company permission to control and manage its great rival, the Atlantic and Gulf Road.
>
> "Already has the State empowered the Central Company to control the Waynesborough, the Southwestern,

and the Eatonton and Muscogee Roads, making its whole line about six hundred miles in length. But all these are feeding roads of the line from Macon to Savannah, and there is no rivalry between them. The Atlantic and Gulf Railroad has also Savannah for its eastern terminus, whilst its western end strikes the Flint River at Bainbridge, and, connected thus with the Chattahoochee, it opens an active and effective competition with the Central and Southwestern Railroads for the trade of our great cotton region. Indeed the admitted facts of this answer show that the very object of the contemplated purchase, the sole motive which prompts it, is to prevent the ruinous competition which the Gulf Road has already entered into for the freights of the Flint and Chattahoochee regions."

The Chief Justice, concurring in this opinion, said (p. 640):

"But, on the contrary, the public policy of this State, as clearly shown by its legislation, is to encourage fair and just competition, between the different railroad companies of the State, and to discourage monopolies. The fact that the State granted a charter to the Atlantic and Gulf Road, and subscribed to its capital stock, thereby aiding in its construction, shows that it was the policy of the State, to open a thoroughfare across the southern part of her territory, for the benefit of the people of that and the southwestern section, and for the encouragement of fair and just competition with the roads already in existence, thereby securing to her people the transportation of their freights on just and reasonable terms.

"This public policy of the State is violated by the purchase by the Central and Southwestern Railroad Companies, of such quantities of the stock of the Atlantic and Gulf Road as will enable them, by the aid of other stockholders in their interest, to control that road, and destroy that just competition which the legislation of the State, and her subscription to the stock of the Atlantic and Gulf Road, was intended to secure

> and perpetuate for the benefit of her people occupying a large extent of her territory, who would otherwise be left at the mercy of an overshadowing corporation possessing the power to load them with unjust burdens, to accumulate a large reserved fund, beyond just and liberal dividends to its stockholders, to be used in extending its control, by other like purchases, and making more complete its dominion over the government and people of the State."

In the case of *Pennsylvania Railroad Co. v. Commonwealth, supra,* it appeared that the Pennsylvania Railroad Company leased and operated the Tyrone & Clearfield Railroad and the Bald Eagle Valley Railroad, with their branches. These leased roads reached portions of the Clearfield coal region. The Beech Creek, Clearfield & Southwestern Railroad Company owned and operated a railroad which was practically completed, reaching portions of the Clearfield coal region. The foregoing leased roads of the Pennsylvania Company and the Beech Creek road were substantially competitors from the coal regions. The Pennsylvania Railroad Company through its executive officers undertook to buy the stock of the Beech Creek Company and have it vested in the Northern Central Company, in which latter company the Pennsylvania owned six-thirteenths of the stock. The court held the fact that the Pennsylvania Company had a substantial interest in the Northern Central Company made it unlawful for that company to purchase the stock of the Beech Creek Company, which was in competition with the two roads leased by the Pennsylvania Company.

The Constitution of Pennsylvania provides:

> "No railroad, canal, or other corporation, or the lessees, purchasers, or managers of any railroad or canal corporation, shall consolidate the stock, prop-

erty, or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any other railroad or canal corporation owning or having under its control a parallel or competing line."

The court said on page 376:

"It is clear that a violation of this section would be threatened if the Pennsylvania Railroad Company, which leases certain roads directly and substantially competing with the Beech Creek road, were about to buy and hold in its own name a majority of the stock of the latter company; for in that case the Pennsylvania Railroad Company, as such lessee, would certainly 'control another railroad corporation owning or having under its control a parallel or competing line.' It will be seen that this language differs, in an important respect, from the language lately construed by the supreme court of the United States in the case of *Pullman's Palace Car Co. v. Missouri Pac. R. Co.*, 6 Sup. Ct. Rep. 194. There the contract spoke of 'roads' under the control of the defendant; and it was declared that to own a majority of the stock of a railroad corporation did not give the control of the road, although it might give control of the company. Here, however, the clause of our constitution just quoted speaks of the control of the company—not of the control of the road—and it seems evident, therefore, that the case referred to is not now in point, and need not be further considered. Indeed, it was expressly conceded upon the argument that the Pennsylvania Railroad Company, as the lessee of lines competing with the Beech Creek road, could not buy this stock, and hold it in its own name; but it was strongly urged upon us that the Northern Central Railway Company is to be treated as the purchaser because it is to hold the legal title, and that the question of legality must be determined as if it concerned only this latter company and the Beech Creek corporation."

In the case of the *People v. Chicago Gas Trust Co.*, 130 Ill. 268, the Chicago Gas Trust Company was organized with power "to purchase and hold or sell the capital stock of any gas or electric company or companies in Chicago or elsewhere in Illinois." The charge in the information was that the defendant had purchased a majority of the shares of stock in each of four companies. Some of the pleas to this information set forth that it had bought "capital stock," not admitting that it had bought a majority of the capital stock. It was therefore not clear whether under the demurrer to these pleas the issue was the validity of the purchase of a majority or of a minority. The court seems to have considered the purchase of any stock as illegal, for it was said in the opinion (p. 282):

> "If it be conceded, however, that the three pleas are not defective for the reason thus specified, they present the question whether appellee can lawfully purchase and hold shares of stock in other gas companies, the number of such shares being less than a majority, and, therefore, too small to give a controlling interest in such other companies."

It appeared that the defendant company had in reality bought a majority of the stock, but the opinion of the court is evidently based on the theory that it is against public policy and is not a "lawful purpose," to buy any stock in competing gas companies, for the Court said (p. 293):

> "Whatever tends to prevent competition between those engaged in a public employment, or business impressed with a public character, is opposed to public policy and, therefore, unlawful. Whatever tends to create a monopoly is unlawful as being contrary to public policy."

Bearing in mind the principles thus laid down, as to public service corporations, let us consider the subject from the standpoint of principle. Whatever "tends to monopoly" is void. Anything which "tends to suppress competition," in whatever degree, is void. Undoubtedly the competition thus suppressed must be substantial, which is another way of saying that the restraint must be substantial, but in the case of two lines of railway with a substantial competitive traffic any restraint placed upon the free competition between them, whatever the degree thereof, is inhibited by the Sherman Act. Who can measure the suppression of competition between competing carriers by the acquisition of stock in the one by the other and the election of common directors? The law says that the incentives to compete must not be taken away. The self-interest of the corporation to protect and enlarge its business by giving reasonable rates, good service, adequate means of transportation, and constructing lines into new territory in order to expand the business of the corporation shall not be destroyed. Any agreement or combination which takes away these incentives and lessens the interest of the parties to compete is void.

Take the Santa Fe case as an illustration. Several of the large stockholders and directors of the Union Pacific acquired a sufficient amount of stock so that by the system of cumulative voting in vogue for the election of directors in the Santa Fe, they could have forced the election of certain directors. They demanded this right. It was at first refused. Finally the Santa Fe directors agreed to the election of two members upon the board of that company who were also directors and stockholders of the Union Pacific. One of the two, in fact, was placed upon the Executive Committee of the Santa Fe. To the extent of this

ownership represented by these directors, the interest of the Union Pacific and Santa Fe to compete was lessened.

Furthermore, the evidence in this case is conclusive as to the effect of this suppression of competition. The Santa Fe, on the demand of the Southern Pacific, sold to it a competing line which it had under construction into Southern Pacific territory, for the avowed and only purpose agreed to by both sides that the Santa Fe should retire from the territory of the Southern Pacific and give the latter a monopoly; and at the same time, as a part of the same deal, the Santa Fe put certain of its railways north of San Francisco, which it was about to extend, into a company which also acquired the railways of the Southern Pacific in the same territory, and competition in and out of that great region was suppressed. They divided the fruit traffic of California between the Santa Fe and the Southern Pacific.

The Santa Fe having taken off the steamships running in connection with its railroad from the Pacific Coast to the Orient, the Pacific Mail Steamship Line, a majority of the stock of which is owned by the Southern Pacific, agreed to and does divide the in-bound Oriental traffic between that line, and the Santa Fe line in certain proportions, by delivery of alternate cargoes to the Santa Fe and the Southern Pacific. The one last competitor in this territory was thus silenced by this community of interest and common directors.

Who can determine the amount of stock it is necessary for a railroad to own in its competitor to create some suppression of competition and restraint of trade? Who can measure the effect upon such competition by the ownership of any considerable amount of stock? Clearly the Court cannot inquire into the degree of suppression of com-

petition, or the amount of ownership necessary to accomplish it.

In the case of *Salt Co. v. Guthrie*, 35 Ohio State 666, the Court said (p. 672):

> "The courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public."

It has invariably been held that the ownership of stock in a competitor sufficient to control inevitably takes away the incentive to compete, and the Courts will not require testimony as to whether such competitors actually do compete, or whether competition has really been suppressed in any degree. Courts will not permit the creation of a condition which lessens in any degree the interest of such lines to compete. So long as free competition is the policy of the nation governing naturally competing lines of road, the only safe rule is to frown upon this modern invention of community of interest by the ownership of less than the majority of the stock. The evidence is clear in this case that the object of acquiring the stock of these various lines was to suppress competition. The stock in the Northern Pacific was acquired, not only to nullify the competition with that line, but to obtain a voice in the control of the Burlington and thereby to control its competition. This is admitted. The object of acquiring the stock in the Santa Fe was the same. The object of acquiring the half ownership in the San Pedro was to throttle the competition of that projected line being constructed from Salt Lake to the Pacific Coast.

It is the rule under the authorities that the Court will not wait until the object of the monopoly has been at-

tained or fully consummated, but will enjoin any act tending to monopoly or restraint of trade. Is the Court going to refuse the injunction here because as to certain of the defendants the restraint is not complete or the monopoly is only partial? The authorities are to the contrary.

VI.

THE FACT THAT THE UNION PACIFIC HAS, SINCE THE COMMENCEMENT OF THIS SUIT, SOLD THE BALANCE OF ITS STOCK IN THE GREAT NORTHERN AND NORTHERN PACIFIC AND IN THE SANTA FE, IS NO REASON WHY AN INJUNCTION SHOULD NOT BE GRANTED.

As we have shown, the evidence is clear in this case that the object in purchasing the stock in the Northern Pacific, with the consequent control of the Burlington, (which upon the distribution of the assets of the Northern Securities Company vested in the Oregon Short Line a large amount of Northern Pacific and Great Northern stock), and the purchase of the stock in the Santa Fe, was to suppress competition between those lines of railway. The testimony of defendants Kahn and Schiff and other witnesses is clear upon this subject, and has been reviewed with care in the brief of facts. (See brief of facts, pp. 566 to 603.)

Furthermore, the Union Pacific still has one director upon the board of the Santa Fe. The Government is entitled, therefore, to an injunction, although temporarily the stock has been sold. The defendants could easily buy the stock again and compel the Government to bring another suit. Upon the latter proposition this ruling of this Court is clear.

> *United States v. Trans-Missouri Freight Association*, 166 U. S. 291.

VII.

THE CONTROL OF THE SAN PEDRO ROAD, UNDER THE CIRCUMSTANCES OF THIS CASE, TENDED TO SUPPRESS COMPETITION AND IS VOID, ALTHOUGH THAT LINE WAS NOT COMPLETED AT THE TIME OF THE ACQUISITION OF THE STOCK THEREIN.

Bearing in mind, that this is not an action under a statute preventing a railroad from purchasing stock in a competing line, but an action by the Federal Government to enjoin a restraint upon trade and commerce among the states, and an attempt to monopolize the same, it is evident upon principle that competition is restrained by throttling and preventing the construction of competing lines of railroad as well as by controlling the competition of such lines after they are constructed. This is equally so if the existing railway forces the new company to admit it to such an interest in the enterprise as will prevent competition when such new line is completed. Any agreement or contract, any combination or conspiracy to suppress competition, either in existence or potential, is inhibited by the Sherman Act.

United States v. Standard Oil Co., 173 Fed. 176; 221 U. S. 1;

United States v. Patterson, 59 Fed. 280;

Interstate Commerce Comm'n v. Phil. & Reading R. R. Co., et al., 123 Fed. 969;

Thomsen v. Union Castle Mail S. S. Co., 166 Fed. 251.

In the latter case Judge Noyes, in speaking of a combination to shut off outside competition, said (p. 253):

> "It is as unlawful to prevent a person from engaging in business as it is to drive a person out of business."

In the Patterson case Judge Putnam uses the following language at page 283:

> "As to all the propositions touching the existence of commerce in cash registers or knowledge or want of allegation of knowledge on the part of the accused, it is sufficient to say that those counts which do allege the existence of such commerce also allege positively knowledge on the part of the defendants; and those which do not allege such existence are sufficient because *neither the letter of the statute nor its purpose distinguishes between strangling a commerce which has been born and preventing the birth of a commerce which does not exist.*"

In *Interstate Commerce Commission v. Philadelphia & Reading R'y Co.*, Judge Lacombe in refusing to require the production of certain contracts before the Interstate Commerce Commission said (p. 972):

> "It appears that heretofore certain coal operators and coal companies which were not owned or controlled by the defendants, being dissatisfied with the freight rates or with the manner in which the business of transportation was being conducted, came together for the purpose of building or securing the building of a new road from the coal regions where their mines were located to tide-water. The defendants being unwilling to meet the competition which such a new road would introduce, combined together and bought up the collieries of those who were promoting the new road.

> Thereupon the project of building such competing road was abandoned. The contracts in question are parts of the machinery by which this combination prevented the building of the new road. If the defendants were being prosecuted under the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209, U. S Comp. St. 1900, p. 3200) for having entered into a combination, agreement or contract in restraint of trade, the contracts in question would be relevant testimony."

The case of *Hartford & New Haven R. R. Co. v New York & New Haven R. R. Co.*, 3 Robertson (N. Y. Superior Court) 411, is a very important one argued for the prevailing party by Mr. Evarts, and depended, not upon express enactment such as the Sherman Law, but upon the common law. The court discussed in this case a certain contract in the following language (p. 415):

> "It is conceded by both parties that the contract of March, 1850, is void, as being opposed to public policy. An inspection of the contract satisfies me it is so. It is a compact between the parties intended to affect the facilities for public travel over a route of railroad which had been or might be authorized by law. The defendants were lessees of the New Haven & Northampton Railroad, then in part constructed. The lessors had covenanted not to extend the road northerly beyond Granby Station (a point a little north of the Connecticut line) without the consent of the defendants, and had given over to the defendants all the franchises and corporate powers of such lessors for the purpose of locating or constructing any railroad or extension of any railroad northerly from Granby Station. By the agreement with the plaintiffs of March 16, 1850, the defendants covenanted to hold the franchises and corporate powers conveyed to them by such lease until the first of July, 1869, and during such time not to extend such railroad north of Granby Station. Such an arrangement was intended to prevent the extension of the New Haven & Northampton Railroad to any

point north of its terminus at Granby, and to prevent any competition in travel detrimental to the interests of the plaintiff's road, which had a monopoly of the carrying trade from Springfield and points north of Springfield via the Northampton and Springfield road, which such extension might afford. The completion of the New Haven & Northampton Railroad to Northampton would open a new line for travel southward, and would be a competitor and rival of the road of the plaintiffs. Such competition and rivalry it was not lawful for these parties to prevent or attempt to prevent, and any contract to effectuate such a purpose is void. Public policy is opposed to any infringement of the rights of travel or of any of the facilities which competition may furnish, and the law will not uphold any agreement which does or may injuriously affect such rights or facilities. *(Doolin v. Ward*, 6 John. 194; *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 id. 434; *Shrewsbury and Birmingham R. R. Co. v. Lond. & N. W. Etc. R. R. Co.*, 21 L. & E. Rep. 319; *State v. Hartf. and N. H. R. R. Co.*, 29 Conn. R. 538; *Hood v. The Same*, 22 id. 502.)"

The case of *State v. Hartford & New Haven R. R. Co.*, 29 Conn. 538, cited by the court in the above case, was an application for a mandamus to compel the respondent to operate a portion of its railroad which it had ceased to operate under the contract discussed by the New York Superior Court. In consideration of the New York & New Haven R. R. Co. preventing the extension of a line which would be competitive with the Hartford & New Haven, the latter had agreed to cease running passenger trains over a mile and a half of its track reaching the harbor at New Haven and connecting with the steamboats to New York, which were competitive with the New York & New Haven R. R. Co., and it was to compel the resumption of business over this road that the suit was brought by the

state. The Supreme Court of Connecticut used this language in reference to this contract (p. 546):

> "The contract with the New York & New Haven Railroad Company that they will not permit the public to enjoy the benefit of this part of their road amounts to nothing. It is, in our judgment, an aggravation of their censurable neglect of duty, instead of a legal excuse for the neglect. What right have they to covenant with that corporation that they will not run cars to tidewater as the charter provides that they shall, and as the public accommodation requires, especially when they enter into that covenant to secure to that corporation a monopoly of the public travel to and from New York and as an equivalent to secure to themselves a like monopoly of all the travel in the Connecticut Valley to the prejudice of every other corporation that might have an interest in those routes? The whole proceeding from first to last seems to us to be in contravention of the charter obligations of both these companies and to present a case of odious monopoly if not of positive oppression and wrong which can receive no countenance from an impartial tribunal."

In the case of *Farrington v. Stucky*, 165 Fed. 325, the court held that an agreement not to locate a depot within a certain number of miles of another station was illegal. The court said of the agreement (p. 330):

> "It comes clearly within numerous decisions in which contracts binding railroad corporations to locate a depot at a given point, and depriving them of the power to construct a depot at any other place, have been held illegal and void."

We will not in the brief of law, review at any length the facts to show the suppression of competition by the control of the San Pedro line: The line was under construction and a considerable portion thereof had been built

or purchased and much additional mileage had been graded, practically the whole line surveyed, and large sums had been expended for rights of way, terminal grounds and construction material. It was backed by ample money; it was intended as an independent competing line connecting the railroads from the east at Salt Lake with the Pacific Ocean. As soon as the Union Pacific got control of the Southern Pacific, in order to kill this independent line, it threatened to parallel it. The means of the gentlemen connected with the enterprise, large as they were, were not equal to the combined capital of this enormous combination, backed by one of the greatest banking houses in Wall Street. The result was what might have been expected. They reluctantly turned over to the Union Pacific one-half of the stock of the San Pedro, at once destroying its independence, and in addition placed the remaining stock in trust under an agreement which, as shown in the brief of the facts, was intended to ultimately place in the treasury of the Union Pacific a majority, if not the whole of the stock.

Not only did they, through stock ownership, place the power in the hands of the Union Pacific to control this road, but they entered into contracts whereby it was agreed that the San Pedro would not for 99 years build into the territory of the Short Line, or the Short Line into its territory. Such a contract, as we have shown above, was held illegal at common law by the courts of New York and Connecticut. They further agreed that the Union Pacific should make the joint rates on both lines in and out of Utah and that the San Pedro Road would put into force on its lines local rates used by the Southern Pacific, and neither party would change any such rates without the consent of the other for 99 years. Another

agreement was later made between the parties that the San Pedro Company would not join in rates to and from points north of Mojave and Santa Barbara on any traffic to or from Utah common points or beyond, thereby eliminating this line, in connection with the Santa Fe, as a possible competitor of the Southern Pacific for business to Northern California. (Brief of Facts, pp. 463 and 64.)

In addition to the authorities above cited as to the illegality of preventing the construction of a proposed competing line it has been directly held, under the laws of some of the states, that it is as illegal to monopolize commerce by acquiring a *competitive road, under construction,* as to control one already built.

> *Pennsylvania R. Co. v. Commonwealth*, 7 Atl. 368; (not officially reported).
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> *Langdon et al. v. Branch et al.*, 37 Fed. 449;
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> *Hamilton et al. v. Savannah, Florida & Western Ry. et al.*, 49 Fed. 412;
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> See also *Commonwealth v. Beech Creek &c. R. Co.*, 1 Pa. Co. Ct. Rep. 223.

In the case of *Pennsylvania Railroad Co. v. Commonwealth*, 7 Atl. 368, the Pennsylvania Railroad Company owned a line of road from Philadelphia to Harrisburgh and Pittsburgh. The South Pennsylvania Company was incorporated with authority to construct a line from Harrisburgh to Port Perry, where it connected with the Pittsburgh, McKeesport & Youghiogheny Railroad, giving it access to Pittsburgh. No part of the line had been completed, but some $5,000,000 had been expended in the work of construction, which was about one-fourth of the amount necessary to complete the line. Mr. Morgan, on behalf of certain of the certificate holders of this line,

made a proposition to the Pennsylvania Railroad which contemplated the Pennsylvania's acquiring not less than 60 per cent of the total issue. The question was whether this was in violation of the Constitution of Pennsylvania, which provided as follows:

> "No railroad * * * or the lessees, purchasers, or managers of any railroad * * * shall consolidate the stock, property, or franchises of such corporation with or lease or purchase the works or franchises of, or in any way control, any other railroad, * * * corporation owning or having under its control a parallel or competing line."

The Court said (67 Atl. 372):

> "But the argument was earnestly pressed upon us that the prohibition of the constitution applies only to a corporation owning, or having under its control, a railroad completed and in operation; that, in the nature of things, there can be no competition in transportation when there is no road over which to transport. The constitution forbids a railroad corporation to 'in any way control any other railroad * * * corporation having under its control a parallel or competing line,' not parallel or competing railroad; and we cannot doubt that the word 'line' was employed advisedly, in this place, instead of 'road' or 'railroad.' It is the term constantly used to denote the route of an intended railroad. Thus, in section 2 of the act of February 19, 1849, relating to the assessment of damages for lands taken, it is provided that viewers may be appointed, 'neither of whom shall be residents or owners of property upon or adjoining the "line" of such railroad;' where manifestly the term 'line' is used to designate the surveyed route, and not the completed road, as the view may be had before the road is constructed. So, in section 2 of the act of congress of July 20, 1866, incorporating the Atlantic & Pacific Railroad Company, the company is author-

ized 'to take from the public lands, adjacent to the line of road, material of earth, stone, timber, and so forth, for the construction thereof.'

"These are random instances of a use of the term which is so common as to leave no doubt as to its meaning in the clause of the constitution under consideration. And, understanding this meaning, we are bound to give it due force and effect. If we do not, the purpose of the constitutional convention in enacting the clause, and of the people in ratifying it, might always be, and in this case would be, entirely defeated. The purpose undoubtedly was to promote competition in railroad traffic. *But if a corporation engaged in constructing a competitive road may be controlled by its rival until the road is completed, it would be entirely within the power of the rival to determine whether that event should ever happen; as, of course, it never would, when it was the interest of the rival to prevent it, for no company would complete a road to hand it over to a competitor.*

"For these reasons, we think the proper construction of the phrase, a 'parallel or competing line,' is that it includes a projected road, surveyed, laid out, and in process of construction, as we have found to be the fact in this case, if such road, when completed, and in operation, would actually compete with the road seeking control. Before completion it is 'parallel,' when completed it becomes 'competing.'"

(Italics are ours).

In *Langdon et al. v Branch et al., supra,* the following questions were involved and decided:

The Savannah, Dublin & Western Short-Line was chartered under the laws of Georgia to construct a railway from Savannah to Dublin in said state. In order to extend the line further to Macon, the company secured or attempted to secure the franchises of the Macon & Dublin Railroad Company, which would enable it to complete the line. It then entered into a contract with one McKetchney

to build, equip and construct the entire line from Savannah to Macon. In accordance with this contract, the Short-Line Company deposited with McKetchney its entire capital stock except $60,000, its mortgage bonds to the amount of $3,000,000, and all of its other assets, in order to enable McKetchney to raise the necessary funds to construct the road. McKetchney was to hold the assets as security for all advances made, expenses incurred, money invested, work done and materials furnished.

Subsequently McKetchney, with the consent of the Short-Line, transferred his contract to a construction company organized under the laws of New Jersey, which assumed all of McKetchney's obligations under said contract. This construction company was in fact insolvent. The complainants were creditors of the construction company, who had loaned money to the President thereof for the purposes mentioned in the contract and thereby, as the Court subsequently held, acquired an equitable lien upon the assets of the Short-Line Company in the hands of the construction company. The latter company did not proceed to execute the contract. On the contrary the President and others in control of the construction company, transferred all of its stock for a nominal consideration to the defendant Branch, who in turn contracted to sell the same to parties who represented the Central Railroad & Banking Company, the owner of a line which was a manifest competitor of the projected railroad. It was not denied that the transfer of the control of the construction company was obtained by money belonging to the Central Railroad & Banking Company.

The Constitution of Georgia provided:

> "The general assembly of this state shall have no power to authorize any corporation to buy shares or stock in any other corporation in this state, or else-

where, or to make any contract or agreement whatever with any such corporation, which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly; and all such contracts or agreements shall be illegal and void. Code, § 5097." (p. 462.)

Judge Speer, sitting in the Circuit Court for the Southern District of Georgia, held that the transaction was in violation of the constitutional provisions, and consequently illegal and void. He granted an injunction enjoining the carrying out of the agreement of purchase, and declared the defendants trustees for the benefit of the complainants and other persons in interest representing the franchises and property of the Short-Line Company. The Court said (pp. 462, 463):

"It is charged in the bill, and not denied in the answers, and besides it is perfectly evident to every intelligent mind, that the Short-Line Railway Company runs parallel, in large measure, with the line of the Central Railroad & Banking Company, extending from Savannah toward Macon, which are important business and terminal points, and that this railroad, if completed, would be a competitive, and dangerously competitive, railway; and there can be no doubt, whatever may be the forms and ceremonies as to the purchase from the Construction Company of the control of the Short-Line Railway, that it was either to defeat its completion, or, when completed, to prevent by harmonious control its effective competition with the Central Railroad & Banking Company of Georgia, of which the present stockholders of the Construction Company are the president and many of the directors. * * * Now, what may not be done directly may not be done by indirection. The Central Railroad & Banking Company could not purchase the control of a railroad running parallel with its line from the same

terminal points. Such a contract would be absolutely void, and, being void, and an absolute nullity, no title would pass under it. This being true, Gen. Alexander, and those who acted with him for the Central Railroad & Banking Company, cannot accomplish the same result in any other manner whatever. They cannot make a purchase to defeat the Short-Line or to control it. It is scarcely just to the intelligence of a court of equity to expect it to fail to perceive the real facts and the true purposes of the contracting parties in the transfer from T. P. Branch to E. P. Alexander, and the subsequent transfer from E. P. Alexander to other persons, themselves directors in the Central Railroad & Banking Company of Georgia, and the Fort Valley & Savannah Company, which is its creature, controlled by its board of directors, and under the same president. The sworn averments of the bill and the answers, and failures to answer by the defendants, under the equity rules sufficiently show to the court what is perfectly evident: that this whole transaction was for the benefit and interest of the Central Railroad & Banking Company of Georgia; that the practical and operative franchises of the Savannah, Dublin & Western Short Line Railway Company, and the shares of stock of the Construction Company, while nominally owned by individuals, and by another corporation, are really under the control of the president and board of directors of the Central Railroad & Banking Company of Georgia, a control as complete and absolute and effective as any power it may exercise."

Again the Court said (pp. 464, 465):

"It must be understood that the great underlying trust, in this whole transaction, was to build, construct, and equip the Savannah, Dublin & Short Line Railway. It was for this that the state granted the charter. It was for this that McKetchney was empowered and given, not the title, but the control of the stock and securities of the Short Line Railway

> Company. It was for this that the Construction Company undertook the trust. And this trust is not to be defeated by the wrongs of individuals, or the illegal contracts of corporations; and since, for its performance, the plaintiffs have in good faith paid their money, they are entitled to recover from the trustees, who refuse to act, what would be their lawful compensation if the trustees had acted."

This decision was not appealed from. It is authority for the proposition that the inhibition upon the purchase or consolidation of parallel and competing lines applies, even though one of the lines is only projected and is not built or in operation. The purchasing company was already organized and its railway was in operation. The line sought to be controlled by it had only been chartered, and the contract for its construction let. Every attempt was made by the parties to cover up the true nature of the transaction, but the Court went direct to the substance of the deal and found that through the attempted purchase of the stock of the construction company, which in turn held the assets of the projected line, the company already in operation was in fact seeking to control and defeat its competitor. This, as the court decided, was in violation of the constitutional provision already quoted.

In *Hamilton et al. v. Savannah, Florida & Western Railway Co. et al., supra,* the plaintiffs were promoters of the East Georgia & Florida Railway Company, organized for the construction of a line of railway which, when built, would be and become a competitor of the defendant Savannah, Florida & Western Railway Company. The promoters made a contract with a construction company to build the road. Under this contract the company's franchises, right of way and improvements were conveyed to the Construction Company, and the plaintiffs were to receive in return certain

stock and first mortgage bonds of the road, together with a cash consideration. After the Construction Company secured control of the capital stock and property of the company, it elected a board of directors and sold out the entire property to the defendants, the competing line, without attempting to construct the road. Following his former decision in *Langdon v. Branch*, 37 Fed. 449, Speer, District Judge, sitting in the Circuit Court for the Southern District of Georgia, held the purchase by the defendants illegal and void under the provision of the Georgia Constitution forbidding one corporation to make any contract with another tending to defeat or lessen competition in their respective lines of business. The Court said (p. 425):

> "With reference to the merits to the controversy, it will be sufficient to say that it appears, as we are now informed, that the East Georgia & Florida Railroad Company and the Savannah, Florida & Western Railway Company are 'competitive,' in the sense in which the term is used in the clause of the constitution of Georgia above referred to. It further appears that, if the Savannah, Florida & Western Railway Company were permitted to control or suppress the East Georgia & Florida Railroad, it will have a monopoly of railway transportation for goods and passengers in all that section of the state from Jessup to the Florida line. It is not denied that the entire franchises and assets of the East Georgia & Florida Railroad Company are now controlled by means of the sale from McCracken & Co. to the Savannah, Florida & Western Railway Company."

VIII.

THE COMBINATION OF STEAMSHIP LINES BETWEEN AMERICAN AND FOREIGN PORTS FOR THE PURPOSE OF SUPPRESSING COMPETITION IS WITHIN THE INHIBITIONS OF THE SHERMAN ACT.

Before the acquisition of the Southern Pacific by the Union Pacific each of these systems had a line of steamers running to Oriental ports, competing for that trade. The Union Pacific had the boats controlled by the Oregon Railroad & Navigation Company, running from Portland; and the Southern Pacific had the Pacific Mail, from San Francisco. The combination of these lines was as much in violation of the Sherman Act as the combination of competing railroads.

Thomsen v. Union Castle Mail S. S. Co., 166 Fed. 251, cited above upon another point.

This was an action for the recovery of treble damages brought under Section 7 of the Act of July 2nd, 1890. The complaint charged that the defendants, who were engaged as carriers in the South African trade, had entered into a combination in restraint of foreign trade and commerce, in violation of the Act and by combining had fixed rates that shut off outside competition. Shippers were required to pay a percentage in addition to a reasonable freight rate, which percentage they were to receive back only in case they refrained from shipping by other lines.

The trial court dismissed the complaint and the case was taken on writ of error to the Circuit Court of Appeals, where it was heard before Lacombe, Coxe and Noyes, Cir-

cuit Judges. Noyes, Circuit Judge, wrote the opinion. The judgment of dismissal was reversed. The Court said (p. 253):

> "The manifest purpose of the combination was to prevent competition between members by maintaining uniform rates, and to eliminate the possibility of competition with other lines by requiring shippers to pay that which was equivalent to forfeit money. * * *
>
> "Whether the restraint of trade imposed by the combination was reasonable or unreasonable is, under repeated decisions of the Supreme Court immaterial. Whether the combination was entered into before or after the plaintiffs commenced to do business is equally immaterial. The statute applies to continuing combinations. It is as unlawful to prevent a person from engaging in business as it is to drive a person out of business. That the combination was formed in a foreign country is likewise immaterial. It affected the foreign commerce of this country, and was put into operation here. The complaint, therefore, states an unlawful combination—a thing 'forbidden or declared to be unlawful' by the act."

We submit that the Government is entitled to a decree reversing the judgment dismissing the cause; that the specific relief prayed in the petition should be granted, and under the prayer for general relief, a mandatory injunction should issue compelling the defendant Southern Pacific to restore to the defendant Atchison, Topeka & Santa Fe the stock and possession of the Phoenix & Eastern Railroad Company, which, as clearly shown by the testimony, was unlawfully acquired for the express purpose of suppressing competition and preventing the opening of new through lines of transportation between California and Eastern points, and the Southern Pacific should be enjoined from

exercising any control over the said Phoenix & Eastern line.

GEO. W. WICKERSHAM,
Attorney General.
FRANK B. KELLOGG,
CORDENIO A. SEVERANCE,
Special Assistants to the Attorney General.

APPENDIX A.

SYNOPSIS OF THE CONSTITUTIONAL AND STATUTORY PROVISIONS OF THE SEVERAL STATES AND TERRITORIES ON THE SUBJECT OF PARALLEL AND COMPETING LINES.

ARIZONA.

Rev. Stats. 1901, § 865:

> "The provisions of the preceding section (relating to the consolidation of railroad corporations) shall not be construed to apply to competing lines of railroads starting from and terminating at the same points within the boundaries of this territory."

ARKANSAS.

Constitution, 1874, Art. 17, § 4:

> "No railroad, canal or other corporation, or the lessees, purchasers or managers of any railroad, canal or corporation, shall consolidate the stock, property or franchises of such corporation with or lease or purchase the works or franchises of, or in any way control any other railroad or canal corporation owning or having under its control a parallel or competing line, nor shall any officer of such railroad or canal corporation act as an officer of any other railroad or canal corporation owning or having control of a parallel or competing line * * *."

Kirby's Digest of Ark. Stats., 1904, § 6741 (Act of 1887, Ch. 80, § 6):

> "No such consolidation shall be effected except between corporations, the union of whose roads will

make a continuous line, nor shall any such consolidated company own, control, operate, lease, purchase or consolidate with any parallel or competing line."

CALIFORNIA.

Kerr's Civil Code, 1906, § 465, gives every railroad corporation power—

> "To purchase, lease or acquire the franchises, rights and property, or any part thereof, of any railroad, corporation * * * ; provided, that nothing herein shall authorize any corporation to purchase the franchises, rights and property of any railroad operated in competition with it; and to purchase, acquire and hold the stocks, bonds or other securities of any railroad corporation organized under the laws of this state or of any other state or territory, with full power to sell the same; provided, that nothing herein will authorize any corporation to purchase the stock of any railroad corporation operated in competition with it."

COLORADO.

Constitution, 1876, Art. 15, § 5:

> "No railroad corporation, or the lessees or managers thereof shall consolidate its stock, property or franchises with any other railroad corporation owning or having under its control a parallel or competing line."

Mills Anno. Stats., 1891, § 604, after providing for the consolidation of railroads, adds:

> "Provided further, that parallel or competing lines of railroad shall not be consolidated."

Rev. Supp., 1891-1905, § 611, grants power to purchase or lease connecting lines—

"if the lines of roads of such companies are continuous or connected, and not competing or parallel."

And § 612-a gives broad powers to purchase and sell—

"Provided, This shall not authorize the purchase or sale of competing or parallel lines."

CONNECTICUT.

Gen. Stats., 1902, § 3674, gives railroads the right to consolidate—

"Provided, that no railroad companies shall be consolidated under this provision whose railroads, built or to be built, run on parallel or competing lines."

FLORIDA.

Gen. Stats., 1906, § 2812:

"* * * Parallel or competing lines of railroad may not consolidate their several franchises, lines or railroad, or the management thereof, without special permission from the State Railroad Commission."

GEORGIA.

Constitution, 1877, Art. 4, sec. 2, par. 4, denies to the legislature the power to authorize any corporation to buy shares of stock in, or to make any contract with, another corporation

"which may have the effect, or be intended to have the effect, to defeat or lessen competition in the respective businesses or to encourage monopoly; * * *"

Code of Georgia, 1895, § 2173, (same, Code of 1911, sec. 2591), gives any railroad power to connect, merge or consolidate with, or purchase, other companies—

"Provided, that no railroad shall purchase a competing line of railroad, or enter into any contract with a competing line of railroad calculated to defeat or lessen competition in this state: * * *"

Sec. 2179, (same, Code of 1911, sec. 2597), also having reference to sale or consolidation, contains the proviso:

"That no railroad company shall make any contract under the provisions of this section with any other railroad company which is a competing line, that is calculated to defeat or lessen competition in this state or to encourage monopoly."

IDAHO.

Code of Idaho, 1909, § 2800:

"Any such railroad corporation may consolidate its stock, franchises and property with any other railroad corporation, whether within or without the state, when such other railroad corporation does not own any competing line of railroad," etc.

ILLINOIS.

Constitution, 1870, Art. 11, § 11:

"No railroad corporation shall consolidate its stock, property or franchises with any other railroad corporation owning a parallel or competing line;" etc.

Hurd's Rev. Stats., Illinois, 1908, Ch. 114, § 39, page 1668, authorizes the consolidation of railroads in certain cases—

"Provided, that no consolidation shall take place with any railroad owning a parallel or competing line;"

Sec. 47 of the same chapter authorizes the purchase and sale of the lessor's remaining interest, in certain cases—

> "Provided, further, that this act shall not be construed so as to permit such railroad company to purchase any parallel or competing line of railroad."

IOWA.

Supp. to Code of Iowa, 1907, § 2038-b:

> "That any railroad corporation so organized under the laws of Iowa and owning and operating a railroad therein, may lease, purchase or otherwise acquire and own, control or operate any connecting extension of its said railroad, not parallel or competing therewith, * * *"

KANSAS.

Dassler's Gen. Stats., 1909, § 7013, provides that any railroad company of this state may sell or lease the whole or any part of its railroad, and any railroad company, domestic or foreign, may aid any railroad company of this state by purchase of its stock or bonds, or by guaranteeing its bonds,—

> "Provided, however, that no purchase, lease or guaranty under this act shall be entered into unless the line of railroad so purchased or leased, or whose stock or bonds are purchased, or the bonds of which are guaranteed, shall when constructed form a continuous line with the road of the company purchasing, leasing or guaranteeing * * *"

Sec. 7016 authorizes Kansas corporations to purchase or lease the road constructed or to be constructed, or to guaranty the bonds, etc., of foreign railroad corporations.

"Provided, however, that no purchase, lease or guaranty under this act shall be entered into unless the line of railroad so purchased or leased, or the bonds of which are guaranteed, shall when constructed form a continuous line with the road of such Kansas company * * *"

KENTUCKY.

,Constitution, 1891, § 201:

"No railroad * * * company shall consolidate its capital stock, franchises, or property, or pool its earnings, in whole or in part, * * * with any other railroad * * * company owning a parallel or competing line or structure, or acquire by purchase, lease or otherwise any parallel or competing line or structure, or operate the same; * * *"

LOUISIANA.

Rev. Laws, 1904, pp. 1484, 1485, authorizes the consolidation of railroads, provided:

"That no railroad corporation shall consolidate its stock, property or franchises with any other railroad owning a parallel and competing line."

MARYLAND.

Pub. Gen. Laws of Md., 1904, Art. 23, § 265:

"It shall be lawful for any railroad company heretofore or hereafter incorporated under the laws of this state to consolidate with any other railroad company incorporated under the laws of this or any other state or of the United States, whose railroad within or without this state shall connect with or form a continuous line with the railroad of the company so consolidating * * * And provided further, that * * * nothing in this section shall be construed to authorize the consolidation of any railroad companies owning or operating competing or parallel roads, or parallel lines

of railroad, which is hereby declared to be unlawful and expressly prohibited without the special consent of the General Assembly being first obtained therefor."

MASSACHUSETTS.

Rev. Laws, 1902, § 276, p. 1040, authorizing the leasing, etc., of railroads, contains the proviso that—

> "The provisions of this section shall not authorize a lease or contract between two railroad corporations each of which has a terminus in the city of Boston."

Supp. to Rev. Laws, Mass., 1902-1908, pp. 1072-1075, provides as follows:

> "Section 1. No corporation owning, leasing or operating a railroad wholly or partly in this commonwealth, nor any person or corporation acting in its interest, shall directly or indirectly, after the passage of this act, acquire or attempt to acquire, by purchase, exchange of shares, or in any other way, any shares of the capital stock of any domestic railroad company not lawfully leased, owned or operated by it prior to the first day of May in the year 1907, except under specific authority provided by statute."

Sec. 8 authorizes certain contracts and leases, but says:

> "The provisions of this section shall not authorize a lease or contract between two railroad corporations, each of which has a terminus in the city of Boston."

Sec. 11 provides that the act shall not be so construed as to ratify any prior acquisitions of a beneficial interest in any shares of stock in a domestic railroad company

MICHIGAN.

Constitution, 1908, Art. XII, Sec. 8:

"No railroad corporation shall consolidate its stock, property or franchises with any other railroad corporation owning a parallel or competing line; * * *"
(Same as in the constitution of 1850.)

Comp. Laws, Mich., 1897, Vol. 2, p. 1964, § 29:

"Any railroad company in this state, forming a continuous or connecting line with any other railroad company, may consolidate with such other company, either in or out of this state, or partly within or partly without this state, into a single corporation: Provided, That no such companies owning parallel or competing lines shall be permitted to consolidate themselves into one corporation."

(This provision is carried forward, unchanged, in the Pub. Acts of 1899, No. 266, § 29.)

MINNESOTA.

Rev. Laws, Minn., 1905, § 2896:

"The consolidation of the capital stock, lines, property, franchises, control, or the power of control, of two or more parallel and competing lines of railroad in the hands of any corporation, trustee, agent or representative of any corporation, wheresoever situated, is hereby prohibited and made unlawful."

MISSISSIPPI.

Code of 1906:

"§4057. It shall be unlawful for any railroad company to consolidate with a parallel or competing railroad company, or to allow its affairs to be in any manner managed, regulated or controlled by any such parallel or competing railroad company, or permit its

affairs to be so managed, regulated or controlled by the same person or persons who manage, regulate or control the affairs of such competing or parallel railroad company, * * * And it shall further be unlawful for competing railroad companies, operating parallel lines of road within twenty miles of each other, to lease or purchase, directly or indirectly, the opposing line or any part thereof or any interest therein."

Sec. 4089 authorizes consolidations, "but a consolidation shall not be made with a parallel or a competing road."

Sec. 4090 authorizes leases of railroads "not in either case parallel or competing lines, for a term of years."

MISSOURI.

Constitution, 1875, Art. 12, § 17:

"No railroad or other corporation, or the lessees, purchasers or managers of any railroad corporation, shall consolidate the stock, property, or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line."

Rev. Stats. 1909:

"§3081. It shall be unlawful for any railroad company, corporation or individual owning, operating or managing any railroad in the State of Missouri, to enter into any contract, combination or association, or by any manner of means whatever consolidate the stock, property or franchises of such company, corporation or individual, or to lease or purchase the works or franchises of, or in any way whatever to any degree exercise control over, any railroad company, corporation or individual owning or having under his or their control the management of a parallel or competing

line in this state but each and every such railroad, whether owned, operated or managed by a company, corporation or individual, shall be run, operated and managed separately by its own officers and agents, and be dependent for its support on its own earnings from its local and through business in connection with other roads, and the facilities and accommodations it shall afford the public for travel and transportation under fair and open competition."

Sec. 3082 forbids an officer of a railroad to act as an officer of a parallel or competing line.

MONTANA.

Constitution, Art. XV., Sec. 6:

"No railroad corporation, express or other transportation company, or the lessees or managers thereof, shall consolidate its stock, property or franchise with any other railroad corporation, express or other transportation company, owning or having under its control a parallel or competing line; neither shall it in any manner unite its business or earnings with the business or earnings of any other railroad corporation; nor shall any officer of such railroad, express or other transportation company act as an officer of any other railroad, express or other transportation company owning or having control of a parallel or competing line."

Rev. Codes, Mont., 1907:

"§4292. Any two or more railroad corporations whose respective lines, not being parallel or competing lines, are wholly or partly within this state, * * * when their respective lines of road or any branch thereof so connect within this state that they may operate together as one property, may consolidate," etc.

Sec. 4293 authorizes the lease or purchase of railroads—

> "Provided, The railroad or line of railroad so leased or purchased is continuous of or connected with its own line, and not a parallel or competing line."

NEBRASKA.

Constitution 1875, Art. XI., § 3:

> "No railroad corporation * * * shall consolidate its stock, property, franchise or earnings, in whole or in part, with any other railroad corporation * * * owning a parallel or competing line," etc.

Cobbey's Anno. Stats., Nebr., 1911: Sec. 10543 authorizes the consolidation of continuous lines. In *State v. A. & N. R. R. Co.*, 24 Neb. 158, 38 N. W 43, it was held the statute authorized a consolidation only when the two roads formed a continuous line.

Sec. 10548 provides that—

> "Any railroad * * * may lease or purchase any part of or all of any railroad constructed or to be constructed by any other company, if said company's lines of railroad * * * are continuous or connected."

Sec. 10549 authorizes the purchase of connecting lines, with this proviso:

> "Provided, however, that nothing herein contained shall be construed as authorizing the purchase by any railroad company under the provisions of this act of any parallel and competing line of railroad within this state."

NEW HAMPSHIRE.

Pub. Stats., 1901, Ch. 156, § 22, provides that when two or more railroad corporations have agreed, by vote of their stockholders, to unite and form a single corporation—

> "they may apply by petition to the supreme court for a determination of the question whether the public good will be promoted by such union; and if the court * * * shall determine that the public good requires such union, and that stockholders of the respective corporations, at meetings duly held for the purpose, have voted in favor of it as aforesaid, they shall authorize the union to be made."

NEW JERSEY.

Laws of 1885, p. 255 (Gen. Stats. N. J., 1895, p. 2705, sec. 289):

> "That it shall be lawful for any railroad company or corporation organized under the laws of this state to merge and consolidate their capital stock, franchises and property with those of any railroad company or companies of this state, whenever the said railroads so to be consolidated shall or may form connecting or continuous line or lines of railroad; * * *"

Act of April 28, 1890 (Gen. Stats., N. J., 1895, pp. 2659-60, sec. 82), provides that railroad corporations—

> "which, if having continuous lines, would have the right under the laws of this state to merge and consolidate their capital stock, franchises and other property, may so merge and consolidate, notwithstanding that their lines are not continuous but are connected by such intervening line or lines, and notwithstanding such intervening line or lines are not included in such merger and consolidation; * * *"

Laws of N. J., 1900, Ch. 46, provides that—

> "Whenever any railroad corporation of this state shall own all the bonds and shares of capital stock of any other railroad corporation of this state, whose railroad has heretofore been constructed and connects with the railroad of said first mentioned corporation," it shall be lawful for said first mentioned corporation to hold and exercise all the corporate property, franchises and rights of the corporation so owned.

NEW MEXICO.

Comp. Laws, 1897, § 3892:

> "It shall and may be lawful for any railroad company * * * to merge and consolidate its capital stock, franchises and property with the capital stock, franchises and property of any other railroad company * * * whenever the two or more railroads of the companies or corporations so to be consolidated shall or may form a continuous line of railroad with each other, or by means of any intervening railroad, bridge or ferry."

NEW YORK.

Birdeye's Cum. & Gilbert's Cons. Laws, 1909, Vol. 4, p. 4786, § 80:

> "No railroad corporation or corporations owning or operating railroads whose roads run on parallel or competing lines, except street surface railroad corporations, shall merge or consolidate, or enter into any contract for the use of their respective roads, or lease the same, the one to the other, unless the board of railroad commissioners of the state or a majority of such board shall consent thereto"

(Held to prohibit the formation of a monopoly by the consolidation of competing and parallel railroads. *Continental Securities Co. v. Interborough R. T. Co.*, 165 Fed. 451.)

NORTH DAKOTA.

Constitution, Art. 7, § 141:

"No railroad corporation shall consolidate its stock, property or franchises with any other railroad corporation owning a parallel or competing line; * * *"

Rev. Codes, N. D., 1905, § 4273, authorizes the consolidation, lease or sale of railroads in certain instances—

"But no railroad corporation shall consolidate with, or lease or purchase, or in any way become owner of, or control, any other railroad corporation, or any stock, franchises, rights or property thereof, which owns and controls a parallel and competing line."

OHIO.

Bates Anno. Rev. Stats., 1908, § 3379:

"When the lines of road of any railroad companies in this state, or any portion of such lines, have been or are being so constructed as to admit the passage of burthen or passenger cars over any two or more of such roads continuously, without break or interruption, such companies may consolidate themselves into a single company."

(*State v. Vanderbilt*, 37 O. St. 590, held that two companies owning lines connected only by other railroads, which such companies held by lease, were not authorized to consolidate into one corporation, under the foregoing statute.)

OKLAHOMA.

Constitution, Art. IX., sec. 8:

> "No public service corporation, or the lessees, purchasers or managers thereof, shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way contol, any other public service corporation owning or having under its control a parallel or competing line; except by enactment of the Legislature, upon the recommendation of the Corporation Commission; Provided, however, that the legislature shall never enact any law permitting any public service corporation, the lessees, purchasers or managers thereof, when such public service corporation is organized under the laws of any other state or of the United States, to consolidate the stock, property or franchises of such corporation with, or lease or purchase the works of, franchises of, or in any way control, any other public service corporation organized under the laws of any other state or of the United States, owning or having under its control in this state a parallel or competing line; nor shall any officer of such corporation act as an officer of any other corporation owning or controlling a parallel or competing line."

Snyder's Comp. Laws, Okla., 1909, § 1358, authorizes the consolidation of railroads "when their respective railroads can be lawfully connected and operated together to constitute one continuous main line, with or without branches;" also the lease or purchase of railroads "when such railroads can be lawfully connected and operated together so as to constitute a continuous main or branch line."

OREGON.

Lord's Oregon Laws, 1909, 6686, authorizes railroads to lease or purchase other lines—

"Provided, that nothing in this act shall be construed to authorize the leasing of any railroad line to any company or corporation owning a road which forms a competing or parallel line to its railroad."

PENNSYLVANIA.

Constitution, 1873, Art. 17, sec. 4:

"No railroad, canal or other corporation, or the lessees, purchasers or managers of any railroad or canal corporation, shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any other railroad or canal corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad or canal corporation act as an officer of any other railroad or canal corporation owning or having the control of a parallel or competing line;" etc.

Purdon's Digest, 13th ed., title "Railroads," art. XXVI., (vol. 4, p. 3893), provides:

"No railroad, canal or other corporation of this state, or the lessees, purchasers or managers of any such railroad or canal corporation, shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or hold a majority of the stock of, or in any other way control any other railroad or canal corporation organized under the laws of this state, owning or having under its control within this state a parallel or competing line; nor shall any officer of such railroad or canal corporation of this state act as an officer of any other railroad or canal corporation of this state owning or having the control of a parallel or competing line;" etc.

SOUTH CAROLINA.

Constitution, 1895, Art. 9, sec. 7:

> "No railroad or other transportation company * * * or the lessees, purchasers or managers of any such corporation, shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any other railroad or other transportation * * * company owning or having under its control a parallel or competing line;" etc.

Civil Code, S. C., 1902, sec. 2050, authorizes consolidations—

> "Provided, That nothing contained in this section shall authorize any merger or consolidation inconsistent with the constitution and laws of this state with regard to parallel or competing railroad lines, but such merger and consolidation shall be subject to the limitations mentioned and specified therein."

Sec. 2060 authorizes railroad companies to lease other railroads directly connecting with their own, subject to the constitutional provisions.

SOUTH DAKOTA.

Constitution, 1889, Art. 17, sec. 14:

> "No railroad corporation shall consolidate its stock, property or franchises with any other railroad corporation owning a parallel or competing line;" etc.

Civil Code, S. D., secs. 494, 495 (Comp. Laws, 1908, Vol. 2, Civ. Code pages 60, 61), authorize the consolidation and lease of railroads—

"Provided, That nothing in this act contained shall authorize, sanction, permit or legalize any lease, sale or consolidation of parallel or competing lines of railroad," etc

TENNESSEE.

Code, 1896, sec. 1490:

"Nothing in the last section (authorizing the construction of branch lines) shall be so construed as to make it lawful for any railroad corporation to purchase or consolidate itself with any competing line of railway, whether constructed or in course of construction;" etc.

TEXAS.

Constitution, 1876, Art. 10:

"Sec. 5 No railroad or other corporation, or the lessees, purchasers or managers of any railroad corporation, shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line.

"Sec. 6. No railroad company organized under the laws of this state shall consolidate by private or judicial sale or otherwise with any railroad company organized under the laws of any other state or of the United States."

Sayles' Civil Stats., Texas, 1897, Art. 4529:

"It shall be unlawful for any railroad corporation or other corporation, or the lessees, purchasers or managers of any railroad corporation, to consolidate the

stocks, property, works or franchises of such corporation with, or lease, or purchase, the stocks, property, works or franchises of any other railroad corporation owning or having under its control or management a competing or parallel line; nor shall any officer, agent, manager, lessee or purchaser of such railroad corporation act as or become an officer, agent, manager, lessee or purchaser of any other railroad corporation in leasing or purchasing any parallel or competing line."

(Act of 1887.)

UTAH.

Constitution, 1895, Art. 12, sec. 13:

"No railroad corporation shall consolidate its stock, property or franchises with any other railroad corporation owning a competing line."

Comp. Laws, 1907, Ch. 11, sec. 434, subdiv. 5, authorizes the lease of railroads—

"Provided, that this section shall not be construed to permit any railroad company to lease or operate in whole or in part any competing line situated within this state."

And subdivision 6 authorizes consolidations, "Provided that the lines of such companies shall not be competing, but shall be substantially continuous or connective," etc.

WASHINGTON.

Constitution, 1889, Art. 12, sec. 16:

"No railroad corporation shall consolidate its stock, property or franchise with any other railroad corporation owning a competing line."

Pierce's Washington Code, 1905, sec. 7802:

"Any such railroad corporation may consolidate its stock, franchise and property with any other railroad

corporation, whether within or without the state, when such other railroad corporation does not own any competing line or railroad," etc.

Laws, Wash., 1909, Ch. 196, authorizes the purchase, lease or consolidation of railroads—

"Provided, that no railroad or transportation corporation shall consolidate its stock, property or franchises with any other railroad or transportation corporation owning a competing line, or purchase either directly or indirectly any stock or interest in a railroad or transportation corporation owning or operating a competing line."

WEST VIRGINIA.

Constitution, 1872, Art. 11, sec. 11:

"No railroad corporation shall consolidate its stock, property or franchise with any other railroad owning a parallel or competing line, or obtain the possession or control of such parallel or competing line by lease or other contract, without the permission of the legislature."

Code of W. Va., 1906, sec. 2346, authorizes the extension, consolidation, lease or purchase of railroads in certain cases—

"Provided the railroad or railroads so proposed to be consolidated or purchased are not parallel or competing railroads to the company consolidating or purchasing the same;" and further provided they form a through line, etc.

"Sec. 2468. This act shall not be construed to authorize any railroad corporation to consolidate its stock, property or franchise with any other railroad owning a parallel or competing line, nor to obtain the posses-

sion or control of such parallel or competing line by lease or other contract."

WISCONSIN.

Sanborn & Berryman's Wis. Stats., Supplement of 1906, p. 920, sec. 1833, authorizing the consolidation of railroads, provides:

> "But no railroad corporation shall consolidate with, or lease or purchase, or in any way become owner of or control, any other railroad corporation, or any stock, franchises, rights or property thereof, which owns or controls a parallel and competing railroad to and with the railroad owned or controlled and operated by such purchasing railroad corporation," etc.

WYOMING.

Constitution 1889, Art. 10 subdiv. "Corporations," sec. 8:

> "There shall be no consolidation or combination of corporations of any kinds whatever to prevent competition, to control or influence productions or prices thereof, or in any manner to interfere with the public good and general welfare."

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No. 446

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In the Supreme Court of the United States.

OCTOBER TERM, 1911

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

UNION PACIFIC RAILROAD COMPANY, *et al.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH.

Brief (with Appendix) for Appellees,
Union Pacific Railroad Company,
Oregon Short Line Railroad Company,
Oregon Railroad & Navigation Company,
Southern Pacific Company.

P. F. DUNNE,
Of Counsel for Appellees.

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MAPS.

Map of Union Pacific-Southern Pacific Systems, opposite p. 1 of Brief.

Map Showing Principal Lines West of Chicago under discussion opposite p. 1 of Brief.

MAPS

TOO

LARGE

FOR

FILMING

In the Supreme Court of the United States,

OCTOBER TERM, 1911.

No. 820.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

THE UNION PACIFIC RAILROAD COMPANY, THE OREGON SHORT LINE RAILROAD COMPANY, THE OREGON RAILROAD & NAVIGATION COMPANY, THE SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, THE SOUTHERN PACIFIC COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, FARMERS' LOAN & TRUST COMPANY, EDWARD H. HARRIMAN, JACOB H. SCHIFF, OTTO H. KAHN, JAMES STILLMAN, HENRY H. ROGERS, HENRY C. FRICK and WILLIAM A. CLARK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH.

Brief for Union Pacific Railroad Company, Oregon Short Line Railroad Company, Oregon Railroad & Navigation Company, Southern Pacific Company, Appellees.

STATEMENT.

C. P. Huntington died in August, 1900. At the time of his death he was an owner of stock in the Southern

Pacific Company, considerably less than a majority interest. He left this stock by will to his wife and to his nephew, H. E. Huntington; two-thirds of it to Mrs. Huntington, one-third to H. E. Huntington. The Union Pacific Railroad Company, a corporation of Utah, acting under express authority of a statute of Utah, bought Mrs. Huntington's stock from her in the latter part of February, 1901. At the same time, it bought H. E. Huntington's stock. Mr. Edwin Hawley, who had been an Assistant Freight Traffic Manager of the Southern Pacific Company, had some shares of the Southern Pacific stock. The Union Pacific bought these shares from him, and bought some further shares in the ordinary way, in the New York market. This Huntington stock, including under that expression whatever shares came from Mr. Hawley, was less than twenty-five per cent of the outstanding issue; the remaining shares, picked up here and there in the market, represented about thirteen per cent (Record, pp. 4948, 4723). The stock, taken over in this way, came to 750,000 shares, approximately thirty-seven and one-half per cent of the outstanding stock of the Southern Pacific Company. The right of the Union Pacific, a State railroad corporation, to buy the stock in this way by out-and-out sale, is the point in the case.

The Union Pacific was reorganized in 1898. The new management took it out of bankruptcy, put millions of dollars into the property, improving, reconstructing, equipping and standardizing it, preparing it to meet the volume of traffic which they looked for with better times, and which actually came. But

for all that, the Union Pacific was only an intermediate carrier. The field between the Atlantic Seaboard and the middle West, where Chicago is the conspicuous gateway, was occupied by the so-called Trunk Lines, like the New York Central and the Pennsylvania. Between Chicago and the Missouri River were the strong Iowa Lines, as they are termed, like the Chicago & Northwestern, the Burlington, the Rock Island, not to mention others. The Union Pacific began at the Missouri River, at Omaha and Kansas City. Unlike the Santa Fe, which extended all the way from Chicago to California, the Union Pacific stopped at Ogden. There it met the Southern Pacific line from Ogden to San Francisco; and upon that line it depended, as its sole rail connection, for access to the great business of California, coming and going, east-bound and west-bound.

In 1900, when C. P. Huntington died, he had passed, by nearly a decade, the Scriptural limit of three score and ten. His great age had carried the suggestion that the time when he should pay his debt to Nature, could not be remote. It was vital to the Union Pacific, as an intermediate carrier, to have permanent, friendly relations with the Southern Pacific, to be and remain its preferred connection. If the stock of C. P. Huntington, on his death, had passed from his widow and his nephew into unfriendly hands, the Union Pacific would have been "bottled up" at Ogden (Record, p. 1219). The Denver & Rio Grande Railroad, like the Union Pacific, came west to Ogden, there connecting with the Southern Pacific; and with its affiliated lines, represent-

ing the Gould interests, the Denver & Rio Grande went east beyond the Missouri River and into the Middle West (Record, pp. 4955-6). The importance of the Southern Pacific to the Gould interests is obvious enough; so obvious, that when the Union Pacific, through the purchase of the Huntington stock, became sufficiently intrenched in the management of the Southern Pacific to assure, to a reasonable probability, its position as a preferred connection, the Denver & Rio Grande built an entire railroad, the Western Pacific, from Salt Lake to San Francisco; it undertook and it carried through that great work, at enormous expense; it was not willing to be "bottled up" at Ogden.

It was understood that the Gould interests were desirous of securing the Huntington stock (Record, pp. 4727-8, 4740). It was also understood that the Burlington, which came west as far as Denver, had the same thing in view (Record, p. 4740). There was apprehension that the Burlington would build through to Ogden; a like apprehension was felt in respect to the Chicago & Northwestern (Record, p. 4957). It was generally understood, after Mr. Huntington's death, that his stock would come on the market (Record, p. 4957). Mr. Gould was a director of the Union Pacific. It was only due to his sense of loyalty in that relation that he made no attempt personally in 1900 to buy the stock (Record, p. 4957). But he advised the Union Pacific interests that if they did not want the stock, he would take it, and when the Union Pacific did buy it, he asked for a half interest in the purchase (Record, p. 4956).

Under these circumstances the Union Pacific negotiated for the purchase of the Huntington stock even before Mr. Huntington's death—during the last year or two of his life (Record, p. 4712). Mr. Huntington would not sell (Record, p. 4713). At his death, the situation became acute. The Union Pacific felt the responsibility, it felt the necessity in that situation, and acting not simply in self-defense but in self-preservation, it bought the stock by out-and-out sale in February, 1901.

It had been the policy of the Union Pacific, under its new management, to rehabilitate the road, to upbuild it, to raise it to a high standard of efficiency and performance. That policy attached itself to the Huntington stock when that stock became the property of the Union Pacific; and that stock, minority holding though it was, became influential enough to repeat this policy in the development of the Southern Pacific properties. The majority stockholders of the Southern Pacific, with the power in their hands to ordain otherwise, gave their confidence to the men who had achieved so much for the connecting line, and yielded the executive management of the Southern Pacific Company to the nominees of a minority stockholder. Their confidence and acquiescence in that management were not disappointed. The Southern Pacific, which had pledged its last asset in December, 1900 (Record, pp. 4872, 4943), was, like the Union Pacific, brought up to high standards of efficiency, and for the first time in the history of the Southern Pacific Company the stockholders were paid dividends.

In 1902 a Wall Street pool was formed in Southern

Pacific stock to displace the policy and management of the Union Pacific, and put in a new Directorate that could be counted on to arrest the development of the property, and to distribute the earnings in the way of dividends at a time when the condition and requirements of the railroad, from the Union Pacific point of view, did not justify this diversion of the company's funds (Record, pp. 4724, 752). The Union Pacific had some apprehension that the security and the future of its investment were in peril. It went into the market and bought 150,000 additional shares, thus raising the percentage of its holding to about 45 per cent. The scheme to control the stock and force the dividends was unsuccessful and the pool dissolved away. No further raid on Southern Pacific stock has been attempted; and in the summer of 1909 the Union Pacific sold 50,000 shares of its Southern Pacific stock (Record, pp. 4734-5). No other or further purchase of Southern Pacific stock was made by the Union Pacific until January, 1910, during the session of the last Congress. It became public knowledge that a railroad bill sometimes referred to as the Administration Bill, would be proposed to Congress in which there was a provision assuming to authorize interstate railroads to purchase the stock of other railroads, including competing lines, where the purchaser already owned 50 per cent of the stock in question. Such a provision, without derogation from the validity of the position that the Union Pacific and Southern Pacific were substantially related as connecting, not as competing lines, would, if availed of, go to displace the issue attempted to be made on that head, and the

court would so far forth be *functus lite*. The Union Pacific thereupon started to buy sufficient stock in the market to increase its holdings to the nominated 50 per cent. On the abandonment of the proposed legislation before the Union Pacific had bought the required quota, its further buying of the Southern Pacific stock was discontinued. There was no other purpose in buying the stock. The purpose having failed, the buying stopped. But shares enough had been purchased to bring the Union Pacific holding back to what it had been—at least, approximately—after the pool of 1902. Allowing for the sale of the 50,000 shares, and computing the last purchase, 74,000 shares in amount, the Union Pacific holding in Southern Pacific stock is a fraction over 46 per cent (Record, pp. 4734-5, 4750-51). The original purchase of the Southern Pacific stock, as already noted, was made in February, 1901. This bill of complaint was not filed until February, 1908. During the seven years, the Union Pacific regularly reported the number of shares of Southern Pacific stock in its ownership, year by year, to the Interstate Commerce Commission, and for all these years that ownership was a matter of public record.

Under the Union Pacific management and policy the properties of the two companies have been improved and the facilities enlarged without neglect of one property to the advantage of the other, without prejudice to one part of a line or system in preference of another. The policy of improvement and the distribution of expenditure has been general and equitable.

On the Union Pacific System, for betterments and additions, equipment and new construction, over $132,000,000 were spent in the eight years ending June 30, 1909. For the same period and to the same end, over $241,000,000 were spent on the Southern Pacific Company (Record, pp. 4100, 4103); and the increased efficiency and the superior economies of these improved instrumentalities resulted in a saving to the public, for this same period, of $154,000,000 in railroad charges (Record, p. 4095), and in the establishment of both companies on a dividend paying basis.

The Southern Pacific lines extend from Ogden by way of San Francisco to New Orleans on the south, and to Portland, through Northern California, on the north. The great desideratum and the main object of the Union Pacific in buying the Huntington stock was to secure the relation of preferred connection with the Southern Pacific Company on the business to California, including the great interior business of that State, where practically every point was a Southern Pacific point, reached and served by a network of lines north and south operated by the Southern Pacific Company (Record, p. 4713), and representing a mileage in connection with the Ogden main line and branches of 4212.45 miles (Record, pp. 4494-95). The acquisition by the Union Pacific, as a stockholder, of an interest in the line to New Orleans, sometimes called the Sunset Line, was incidental only; it was not the main transaction; it would have been avoided if possible. But the line from Ogden to San Francisco and its extensions, north and south in California were vital to the Union Pacific Company. These lines were reflected

in the Southern Pacific stock, equally with the New Orleans line, as integral assets of which the Southern Pacific stock was the evidence and muniment of title. That stock was not disintegrable. The Union Pacific could simply take it or leave it. The Union Pacific bought it, and in this way, and incidentally, acquired the interest of a minority stockholder in the entire line from Ogden through San Francisco to New Orleans (Record, p. 4713).

The Pacific Railroad Acts contemplated and required a connecting line extending continuously from the Missouri River to the Pacific Ocean. Congress intended that there should be no solution or breach of physical continuity between the river and the ocean. It went farther and authorized, in this same legislation, the consolidation of the organizations of the two companies which were constructing this line, the one building from the east to the west, the other building from the west to the east, both moving to the point where the rails should meet in their westward and eastward approach, and the meeting point became Ogden. The builders of the Central Pacific line continued their rails from Roseville, near Sacramento, California, on the Central Pacific northward to the Oregon line, there to meet, as it was contemplated by the Act of Congress of 1866, the line of an Oregon corporation building from Portland to the south. The Oregon corporation had a stormy career. It was the resources of the Southern Pacific Company that finally made it and kept it an operating railroad, and thus railroad communication was established between California and Oregon points. The Central Pacific builders likewise extended

their railroad construction into Southern California and beyond.

In addition to the construction northerly just spoken of (Record, pp. 3946-7), they extended the Central Pacific to the south by the purchase and consolidation in 1870 of the short lines in California which had been built by the former Western Pacific from Sacramento through Stockton and Niles to San Jose. In the same way they purchased and consolidated some short lines which had been built from Niles into Oakland. Again, from a point 10 miles west of Stockton they built south again in California, through Merced and Fresno to Goshen (Record, p. 3947). The other lines south were built under some other corporate title (Record, p. 3947). These California lines, north and south, ran through the Sacramento Valley on the north and through the San Joaquin Valley on the south (Record, pp. 3903-4). Under the name of the Southern Pacific the line was built as far south as Deming, New Mexico, and thence continued to El Paso, Texas (Record, p. 3890). From El Paso, the Galveston, Harrisburg & San Antonio road extended through San Antonio to Houston, Texas, there connecting with the Texas & New Orleans road, which ran to the Louisiana-Texas line; there the line was prolonged over the rails of the Louisiana Western to a connection with Morgan's Louisiana & Texas Railroad at Lafayette, La., over which final connection the transit was completed through to New Orleans (Record, p. 3891). These lines between El Paso and New Orleans are owned, as to substantially all the stock, by the Southern Pacific Company. They are operated under separate corporate

organizations in accordance with local statutes. The lines up to El Paso, of which the Southern Pacific Company is also the stockholder, are operated by the Southern Pacific Company under a lease. The use of the names Central Pacific and Southern Pacific, as pointed out in the testimony, may be confusing. It was the Central Pacific that first put on and operated the Sunset line. Until 1885 the Central Pacific was the lessee of these leased lines, and the business was conducted in the name of the Central Pacific. In 1885, after the organization of the Southern Pacific Company, the business was conducted in its name. The Central Pacific people had the line from Ogden to San Francisco and thence to El Paso and New Orleans; the constituent lines to the south were built under various names, Southern Pacific of California, Southern Pacific of Arizona, Southern Pacific of New Mexico (Record, p. 3900). It may further assist in removing any confusion of names to quote a passage from the testimony of Mr. Stubbs (Record, p. 334):

> "The Central Pacific was the original line operated by the Central Pacific Railway Company. That ran from Ogden to Sacramento and from Sacramento to San Francisco. The Southern Pacific Railroad was constructed by the same people. The Southern Pacific Railroad was built to Yuma on the Colorado River and the Southern Pacific Railroad of Arizona was built across to Arizona; and the Southern Pacific of New Mexico was built across the State of New Mexico to El Paso, or to the Rio Grande River, just opposite El Paso.
>
> Well, those lines, those Southern Pacific lines were built by the promoters and constructors, and

practically the owners of the Central Pacific; and the Central Pacific continued to operate them until some time along in 1885, when the Southern Pacific Company of Kentucky, the holding company, was organized and took over all the stocks of both companies. That is my understanding of it. Of course, I am not an authority on those things, but that is my understanding.

The CHAIRMAN (of Interstate Commerce Commission): That is just the point I wanted to determine, that there was a unity of interest at all times between the line from San Francisco east as far as Ogden, and the line subsequently built from San Francisco south then again forms a part of the Southern route.

WITNESS: Yes, sir; practically the same men built them.

The CHAIRMAN: And when the holding company, under the laws of Kentucky, was organized, it acquired both of them at about the same time?

WITNESS: Yes, sir."

The Union Pacific line from Omaha to Ogden was met at Cheyenne by the line from Kansas City by way of Denver. These lines availed themselves of the authority to consolidate their organizations given in the Pacific Railroad Act (Act of July 1st, 1862, Section 16, 12 Stat., 489). The Southern Pacific line, however, for one reason or another, remained outside the consolidation. It will not be difficult, now, to make and hold in the mind a picture of the physical relations between the consolidated Union Pacific line on the one hand and the Southern Pacific line upon the other, in respect to the California situation. The Union Pacific line, originating on the Missouri River bank whether at Omaha or at

Kansas City, is produced westwardly to Ogden, there it passes by continuity into the Southern Pacific line which extends westwardly to San Francisco, northerly through California to Oregon, and southerly and easterly through California, Arizona, New Mexico, Texas and Louisiana to tidewater at New Orleans. Between New Orleans and New York—later, between Galveston, Texas, and New York—the Southern Pacific operated some steamers. These steamers gathered and delivered freight to and from the Atlantic Seaboard, with New York as the point of reception and distribution. This seaboard zone was available as a field of traffic, out and in, for these steamers as far west as a line drawn to the east of Pittsburgh and Buffalo, excluding these two cities, which were too far inland for inclusion in the seaboard zone. The steamship freight from the Atlantic Seaboard was loaded into the trains at New Orleans and hauled thence to California through the El Paso gateway, out of which the only rails into California were those of the Southern Pacific. A converse operation took place on freight from California to the Atlantic Seaboard. Some freight from and to intermediate points between Chicago and the seaboard zone also moved to and from California by way of New Orleans; in this instance, not by water, but by rail—by rail lines, as from Pittsburg and Cincinnati, for example, to New Orleans. The New Orleans line, therefore, or Sunset Line, as it is called, served the business, to an extent, between California and the Atlantic Seaboard, and again, in diminished degree, between California and the territory of which Pittsburg and Cincinnati are indicative. But business from the seaboard

and from the interior could also move, and it did move in preponderating measure, by the northern route—by the Trunk Lines to Midle West gateways, like Chicago, and thence, as by the Iowa Lines, to the Missouri River, and thence by way of Ogden to California. That business could be taken by the Santa Fe at Chicago and carried over one line of one company, all the way to the Pacific Coast. This, of course, meant the exclusion of the Union Pacific from any share in the haul. But if an Iowa line, for illustration, say the Chicago & Northwestern, took the business at Chicago, it would haul it to Omaha; or if the Missouri Pacific took the business at another gateway, St. Louis, for instance, it would make the haul as far as Denver. At Omaha, the Union Pacific was in position to continue the haul from the Northwestern as far as Ogden; at Denver, the Denver & Rio Grande could take up the burden from the Missouri Pacific and bear it likewise to Ogden. Arrived at Ogden, neither the Union Pacific nor the Denver & Rio Grande had any rail connection into California except over the rails of the Southern Pacific. It is entirely clear that whether the business moved by water or rail through New Orleans, or by rail through Chicago or St. Louis, the Southern Pacific, in either case, whether from El Paso or from Ogden, was an essential part of the line and the service; and it is just as plain that neither the Union Pacific nor the Denver & Rio Grande could be in this business for a moment except as a connecting line of the Southern Pacific. It is this business which is characteristic and of the substance of things between the Union Pacific and the Southern Pacific as related carriers; it was only as an intermediate and

connecting carrier that the Union Pacific was in contact with the business at all; it was only as a connecting line of the Southern Pacific, and of the Southern Pacific alone, that it handled a pound of the freight or earned a dollar of the revenue; and yet it is asserted in the bill of complaint that as to this business the Union Pacific Railroad Company and the Southern Pacific Company, at the time of the Huntington stock purchase, were not connecting but competing lines.

From the conclusion which seems to be inevitable that the Union Pacific should be held to be a connecting, not a competing line, in respect to the Southern Pacific on business between the Atlantic seaboard and the interior on the one hand, and California on the other, some way of escape has been attempted through the so-called Portland route or "Paper" route of the Union Pacific into California by way of Portland and the Pacific Ocean. The Oregon Short Line Railroad has its point of beginning at Granger, Wyoming, on the Union Pacific main line, about 130 miles east of Ogden. The Short Line then strikes out at an obtuse angle in a northwesterly direction through Wyoming and Idaho to Huntington in Eastern Oregon. There it meets the railroad of the Oregon Railroad & Navigation Company, which is a physical continuation of the Short Line from Huntington through the State of Oregon to Portland. The Union Pacific owns the stock of the Short Line, just as the Southern Pacific owns the stock of the Texas line; and in turn, the Short Line owns the stock of the Navigation Company. In this way the Union Pacific has a through line from

Omaha, by way of Granger, to Portland, just as the Southern Pacific has a through line from Ogden, by way of San Francisco, to New Orleans. Portland has access by boat to the Pacific Ocean through the Columbia River, into which the Willamette River, which passes through Portland, empties. Long before the advent of railroads in Oregon there was some traffic in products of the soil and merchandise between Portland and interior points accessible to navigable water in Oregon and San Francisco in California. The boats passed through the mouth of the Columbia River and plied in the waters of the Pacific Ocean to and from San Francisco Bay. This business was local; it had no transcontinental relation. The Oregon Railroad & Navigation Company, in its turn, made use of these boats, for the service of freight gathered on its rails or distributed over its rails between Oregon points and San Francisco Bay. It was again a local situation. Transcontinental freight through Kansas City or Omaha, destined for California, never swayed off through Granger to Portland, there to await transshipment and carriage by the Pacific Ocean to San Francisco, as against the direct and connecting line of the Union Pacific and Southern Pacific through Ogden. If that business had gone through Portland, it would, on arriving at Portland, be still just as far from San Francisco as if it was only starting from Ogden on Southern Pacific rails. The route was impracticable. It was never competitive. A stray, misrouted car may have found its way over it (Record, p. 2989). The Union Pacific no more attempted to move business going to or coming from California in that roundabout

way than did the Great Northern, the Northern Pacific or the Canadian Pacific through the Puget Sound ports and the Pacific Ocean. The Canadian Pacific at one time did engage in a limited way in the business on a differential, but when the differential was withdrawn, it abandoned the route.

There is a phase of transcontinental business, incidental in the main transaction of the stock purchase, having no characteristic or material relation to it, which is to be noticed. This is the business to and from China and Japan—the Asiatic or Oriental business—moving in small part through the port of Portland and having its substantive entrepot through the port of San Francisco. In volume it was relatively inconsiderable; in its bearing on the real transaction in controversy here, it was incidental and remote. Wheat was grown in Eastern Oregon and Washington along the lines of the Navigation Company and the Northern Pacific. Some of it was turned into flour at points in the interior; some of it was milled at Portland. This wheat and flour sought a market in the Orient. The Northern Pacific hauled the wheat and flour to Puget Sound, where ships were available to take cargoes to China and Japan. In the absence of like facilities for ocean carriage at Portland, the rail haul on this freight would accrue to the Northern Pacific—the entire rail haul from points of production common to the rails of the Northern Pacific and the Navigation Company; the long haul, again, to the Northern Pacific from points local to the Navigation Company, for in that case the Navigation Company

would be short-hauled from the producing point to the nearest junction between the Navigation Company and the Northern Pacific. The farmer or the miller would send his Asiatic freight by the railroad that could give him a ship. Under these circumstances, the Oregon Railroad & Navigation Company chartered some ships out of Portland to the end that it might secure the rail haul to Portland with trans-shipment thence to the Orient, and keep the flour mill industry in Portland alive. These ships were operated at a loss. Outbound, they served this local traffic, they were not transcontinental factors. Incidentally to the business outbound for which they were chartered, they picked up some Oriental business for the inbound voyage, relatively unimportant in amount, as the comparative figures will show. It was hardly to suppress competition, in such business as this, that the Union Pacific bought the Huntington stock. San Francisco was the real entrepot for Oriental business, and even there the business was not significant in comparison with domestic traffic. The so-called Sunset Line never engaged in this business, or if at all, only to a negligible degree. The business, outward and inward, moved over the Southern Pacific by way of Ogden, and again by way of the connecting lines, very largely over the Union Pacific, and to a small extent, if at all, over the Denver & Rio Grande. The Union Pacific and Southern Pacific were not only connecting lines by rail on this traffic, but they were partners, using the term in a free way, on the water; they each owned half the stock of the Occidental & Oriental Steamship Company plying between San Francisco and Asiatic ports. The Pacific Mail

Steamship Company was also a carrier in the trans-Pacific trade in and out of San Francisco. Its takings followed the same course of rail carriage as in the case of the Occidental & Oriental Company. In 1900 the Southern Pacific Company acquired 51 per cent of the stock of the Pacific Mail Steamship Company; and that company still pursues the Asiatic business and in the same way. As between Portland and San Francisco, the Union Pacific and the Southern Pacific have always engaged in Asiatic business, primarily and substantially, through the port of San Francisco.

The Pacific Mail Steamship Company is engaged in business between New York and San Francisco through the circumstance that it has a line of steamships between San Francisco and the Mexican and Central American ports, touching at Panama also, and there dispatching and receiving business under a contract with the Panama Railroad, but without any interest in that railroad, or in the connecting ships of that railroad between its eastern terminus on the Isthmus and New York City, plying in the waters of the Atlantic Ocean. While the Southern Pacific Company in 1900 acquired 51 per cent of the Pacific Mail stock, it is quite obvious that in respect to business between New York and San Francisco, engaged in by the Pacific Mail, the Union Pacific, at the time of the stock purchase, could participate in that business, as against the Pacific Mail, only in its capacity as a connecting line of the Southern Pacific Company. And at the time of the stock purchase, the Pacific Mail was not engaged in this business at all; it had withdrawn

from it, and it did not again resume contract relations with the Panama Railroad until 1902, when it was that the Union Pacific management, if it be assumed to have controlled the Pacific Mail, put it back into that business (Record, p. 3994).

Some aspects of business, local in character, as contra-distinguished from transcontinental, may be briefly noted. They relate to business westbound from the Atlantic seaboard to Colorado and Utah, and bear specially on Denver and Salt Lake traffic from this place of origin; and again, to business having reference mediately or immediately to Portland.

Business from the Atlantic seaboard to Denver and Salt Lake could move all-rail. The Trunk Lines could take it to the Middle West gateways, to Chicago, for example, or to St. Louis. The rail lines out of those gateways could take it to the Missouri River. The Northwestern, for instance, could haul the freight to Omaha from Chicago; or the Gould line, the Missouri Pacific, could take the freight at St. Louis, haul it to Denver, and, if it had destination beyond, turn it over to its affiliated line, the Denver & Rio Grande, for the further haul to Salt Lake. The Union Pacific at Omaha could take the freight from the Northwestern and haul it to Denver and Salt Lake. Multiple combinations of rail lines, trunk lines in the first instance, and then Middle West lines, might be instanced, over which this seaboard freight could move all-rail to the Missouri River, thence continuing its transit to Denver and Salt Lake. But there are ports on the South

Atlantic Coast, like Norfolk and Savannah, from which rail lines extend to the Missouri River, say, at Kansas City; and steamers ply between New York and those ports. A Salt Lake man could ship some hardware from New York to Norfolk, thence by rail to St. Louis or Kansas City, and again by rail to Salt Lake. The Denver man could do the same thing on a Denver shipment. Various combinations by water and rail might be used. The Gould lines or the Union Pacific, for example, as just illustrated, could handle the business. The price to the Salt Lake man or the Denver man for this broken service, part water and part rail, was less than by the all-rail routes. Hence it was that the route by way of the South Atlantic ports to Denver or Salt Lake was called, by way of distinction, a differential route.

Again, the Southern Pacific Company, as we have seen, had some steamers between New York and New Orleans—later to Galveston. Its railroad from New Orleans into Texas, continuing as a main line to El Paso, branched off at Houston and went off in a northerly spur as far as Fort Worth, Texas. It also had a piece of road from Galveston to Houston, at which point the spur struck out for Fort Worth. A Salt Lake man could send hardware by the Southern Pacific steamer to New Orleans, later to Galveston, and the Southern Pacific rails could take that merchandise by way of Houston to Fort Worth. There the Southern Pacific activity stopped. But a north and south line out of Fort Worth, like the Colorado and Southern, terminating at Denver, could take the business to Salt

Lake in connection with the Gould line or the Union Pacific—it could also take it to Denver. The Mallory line, a water line, also had steamers between New York and New Orleans or Galveston. Freight by those steamers, by various combinations of rail lines, of which the Missouri, Kansas and Texas, as a north and south line, might be instanced as a member, could move to Denver and Salt Lake. The Southern Pacific and the Mallory lines, in connection with the rail service to the north, were also, like the South Atlantic port lines, differential routes.

For the purposes of this Utah and Colorado business, the Union Pacific line between Ogden and Portland may be disregarded; likewise, the Southern Pacific line between Houston and San Francisco. It remains that the Union Pacific, a rail line, between Omaha and Ogden, or between Ogden and Kansas City, is alleged to be a direct, not an indirect, competitor of a line from New York to Galveston by water, and from Galveston to Fort Worth by rail. If this is so, it is difficult to imagine what lines are not directly competitive; and again, if this be so, and if, *ex hypothesi*, the Southern Pacific rail line had its western terminus at Houston, with no rail line whatever, in any proprietorship, between Houston and California, it would still follow, on the theory of this bill of complaint, that the Union Pacific could not buy stock in its connecting line from Ogden to San Francisco, inasmuch as the Union Pacific, however obvious and vital its connective relation with the line from Ogden to San Francisco, was a direct competitor of the Southern

Pacific Company in some business from the Atlantic Seaboard to Colorado and Utah. That business, as the figures will show, is unimportant; it was not so much as thought of when the Southern Pacific stock was bought (Record, p. 4714). And such as it was, and whatever the attitude of the Southern Pacific Company might have been, one of total recession, let it be assumed— the multiple combinations all-rail, and rail and water, including the South Atlantic port lines and the Mallory line, would have continued active. The disappearance of the Southern Pacific would not have been noticed. The Southern Pacific has never retired from the business; and under Union Pacific management, its water and rail facilities have been greatly enlarged and improved.

Now, as to Portland: It is physically possible, as we look at the map, for freight from the east to be carried to Ogden, and then from Ogden over the Sierra Nevada Mountains into California, and then up north through California, to be lifted over the Siskiyou Mountains into Oregon, and then north through Oregon to Portland—to Portland, the one common point of the Union Pacific and Southern Pacific, except their historical point of connection at Ogden. It is also physically possible for a piece of machinery to go by ship from New York to Galveston, or by rail from Pittsburg to New Orleans and thence through Louisiana and the intervening territory, along the Sunset Line to California, and up through California and Oregon to Portland. But the Union Pacific line, from Omaha to Granger and thence to Portland, is the

natural line, the direct line, the short line. It is not hard to guess the origin of the name, Oregon Short Line. The Portland business, physically possible of carriage in these different ways, was not relatively significant, it was naturally Union Pacific business. It is hardly to be supposed that the Union Pacific bought the Huntington stock to restrain competition that it feared in this business (Record, p. 4713). Portland is on the Willamette River. That river flows up to Portland through the Willamette Valley, and falls into the Columbia River, which takes its waters to the sea. It is navigable at times for a few miles south of Portland—practically, not over 50 or 60 miles; and the Oregon Railroad & Navigation Company up to 1904 had two or three small river boats serving some points on the river. The business of those river boats has been brought into the case to eke out the Portland situation. Every point in Oregon, including the whole Willamette Valley, except these few river points below Portland, and including the Rogue River Valley, south of the Willamette Valley, and to the Oregon State Line, was a local, non-competitive point, on the Southern Pacific. The relative unimportance of this river boat business to the question this Court will decide is brought out in detail by the actual figures of the business, which have been prepared and submitted. Long before the day of the railroad between Portland and San Francisco, there was some freight and passenger business between those points, and here the few river points south of Portland may be assumed and regarded under the name of Portland for convenience. The freight business went to the ocean, in the way,

usually, of some farm products, from the Portland end of the line, and some merchandise from San Francisco. The Pacific Ocean was a common highway, where the Oregon Railroad & Navigation Company, operating these boats,—or its predecessors—met the competition of other craft including steam schooners from Portland and Puget Sound, plying coastwise between the northern harbors and San Francisco. There was some passenger traffic by the sea between Portland and San Francisco. The Siskiyou Mountain Range rose between Portland and San Francisco; the freight haul was difficult and costly. The rail carrier could not meet the cheap service by water (Record, pp. 2901-2). Years ago, the Southern Pacific attempted, if the expression may be indulged, to break into this freight business with the result of what has been described as a foolish rate war ending in the retirement of the rail carrier from any active effort to get the business, which went to the ships (Record, pp. 3976-7, 3985; 4544-5). On the other hand, as to passenger business, the route, San Francisco-Portland, was the scenic route, the well-known Shasta Route of the Southern Pacific Company. A fortune has been spent in advertising it to travelers. Its business is conducted without the slightest regard to the boat service, which, from this point of view, is treated as negligible (Record, pp. 3978, 3985, 4692). The percentage relation of the business involved in this local situation is shown by the actual figures to have no important bearing or significance; it never figured in the consideration of the stock purchase, it was never mentioned, it was not in the minds, if so much even as in the knowledge, of those who bought

the Southern Pacific stock (Record, p. 4713). That stock was certainly not purchased for the sake of two or three river boats and a couple of steamers plying between Portland and San Francisco.

There is one further incidental feature. Traffic may move from San Francisco to points in Washington, Idaho and Montana. The Oregon Railroad & Navigation Company had this boat service from San Francisco to Portland. Its rails could then take the business to some Washington points and to a few points in Northern Idaho. The Northern Pacific had boat service from San Francisco to Puget Sound; thence it had its rail service to eastern Washington, Idaho and Montana. Neither company was dependent on the Southern Pacific rail line between San Francisco and Portland. At Portland, the Southern Pacific was a connecting line of the Navigation Company, and for the matter of that, of the Northern Pacific. The mixed service, water and rail, through Portland and Puget Sound, was cheaper than the all-rail service by the Southern Pacific through Portland (Record, p. 4547). In such business as the Southern Pacific had to these Washington and Idaho points it seems to have been engaged preferentially with the Navigation Company as its connecting line (Record, p. 4547). And its division of the through rate was greater by that connection (Record, p. 4547). It will be seen from the map that the Oregon Short Line has a branch from Pocatello, in southeastern Idaho, northward into Montana, reaching Butte and Silver Bow. The Navigation Company has no rails into Montana. Southern Pacific

business from San Francisco to Montana moved principally by way of Ogden and over this branch of the Short Line as a connecting line (Record, pp. 2939, 4548). It is not conceivable that the Huntington stock was bought with reference to this business, unimportant in character, and conducted substantially with the Union Pacific as a connecting line. As a factor, it was negligible (Record, p. 4713). Indeed, it was so remote and so devoid of significance, that it does not appear in the original bill of complaint at all; and it was not until July 24th, 1909, that the bill of complaint was amended to include an allegation that the Southern Pacific Company was in active competition with the Navigation Company "for a *large* amount of traffic between San Francisco and points in Montana, Idaho and other States."

So much by way of statement of the general case in respect to the existence of competition and its alleged restraint. During March and April, 1901, the Union Pacific bought in the market a large amount of Northern Pacific stock, common and preferred. More than five years later, in July, 1906, the Union Pacific, through the Oregon Short Line Railroad Company, bought ten millions of the Santa Fe preferred stock. It may be noted, by the way, that Mr. Harriman and some friends, in 1904, bought thirty millions of Santa Fe common stock as an investment, attractive to them at the price for which they got it, and when they saw profit enough on the investment in the rise of the market, they sold it out (Record, p. 4722). The suggestion of the bill of complaint seems to be that the Union Pacific

bought the Northern Pacific stock, common and preferred, and the Santa Fe preferred stock for the purpose of monopolizing or attempting to monopolize transcontinental traffic and to suppress competition therein. The purchase of the Northern Pacific stock has a secondary aspect only, in respect to that company. Its relation, primary and of essence, is to the Burlington, as to which the Northern Pacific was interested in the sense of holding half the stock. The Santa Fe preferred stock was an investment purchase. In the liquidation of the Northern Securities Company, some Great Northern stock was distributed to the Union Pacific. Since November, 1908, the Union Pacific has not owned a share of Northern Pacific stock—it sold it all; nor a share of Great Northern stock since April 6, 1909, nor a share of Santa Fe stock since July 31, 1909. It sold them all.

The *Northern Securities Case* is familiar history, in which the Union Pacific purchase of this Northern Pacific stock played a part. The Union Pacific was a connection of the Burlington, which originated considerable traffic, and was a competitor as well. The purchase of the Burlington by the Great Northern and Northern Pacific, half and half, was over the protest of the Union Pacific, and in denial of its request to be admitted to a share in the purchase. The Union Pacific at that time regarded the northern lines with suspicion and resented their entrance into territory occupied by the Burlington and the Union Pacific. The *status quo*, as between the Burlington and the Union Pacific, although in part competitive, was satisfactory

to the Union Pacific, the mutual relations were good, the competition was normal, not "cut-throat" and it was the disposition and policy of the Union Pacific to preserve the *status quo* (Record, pp. 1101-2, 4717). The refusal of the Northern lines to share the Burlington purchase with the Union Pacific, led to the action of the Union Pacific in buying Northern Pacific stock, common and preferred, in the effort to insure the independence of the Burlington, so far as the Northern lines were concerned, and to give the Union Pacific a position and management in its affairs, not inferior to that of the Hill interests. The objective point of the Union Pacific was the independence of the Burlington; it had no policy or wish to control the Northern Pacific as such (Record, pp. 1101, 4719); it was the Northern Pacific, only in its capacity as a Burlington stockholder, that interested the Union Pacific and made the occasion for its investment in Northern Pacific stock. An actual majority of the outstanding Northern Pacific stock, by the aggregation of a minority of common and a majority of preferred shares, was achieved by the Union Pacific. But the retirement of Northern Pacific preferred stock was an article and condition of its issue. The Directorate, favorable to the Hill interests, announced their determination to retire it, holding as they did, a majority of the common stock. A *modus vivendi* followed. The Union Pacific shares of Northern Pacific common stock, on the retirement, as announced, of the Northern Pacific preferred, were transferred to the Northern Securities Company. When that corporation was liquidated, the Union Pacific, instead of receiving the

Northern Pacific stock which it had parted with, was allotted a certain percentage of Great Northern stock and of Northern Pacific stock, in the ratable distribution of the assets of the Securities Company. It sold these stocks as already indicated, and at high figures prevailing in the market. The acquisition of stock, therefore, by the Union Pacific was not with a view to absorbing the Northern Pacific; it was modal and instrumental to the purpose of keeping the Northern lines out of the mastery of the Burlington, and of preserving the *status quo ante*. The ultimate result was, that the Union Pacific was left with the Great Northern and Northern Pacific stock on its hands; it turned all of that stock into cash and dissolved its relations, which had been thereby created, with the two Northern lines. So much, then, of the case as pertains to the Great Northern and the Northern Pacific stock has become academic. The relief asked by the bill against the Union Pacific, in respect to the two Northern lines is *mutatis mutandis*, the same: That they be enjoined from recognizing the Union Pacific as a stockholder, from permitting it to vote their stock, from paying dividends on the stock to it, and from recognizing any dealing by it in the stock. As to the Union Pacific itself, the bill asks that it be enjoined from acquiring or voting this stock, or in any manner acting as its owner. As the Union Pacific is no longer interested in either Northern Pacific or Great Northern stock, the basis for relief on that score has fallen away, and the transactions in the stock are now moot and academic.

Indeed the Northern Pacific and the Great Northern, though named as parties defendant, never so much as appeared by a pleading in this case.

It was from the proceeds of the Great Northern and Northern Pacific stocks that the Union Pacific obtained the money which it invested in the ten millions of Santa Fe preferred. All of that stock has been sold. The relief asked in respect to the Santa Fe stock is in all respects like that just noted in respect to the stocks of the Northern lines, and is subject to the same comment. While not involved in the general scope of the case, or falling within any scheme of specific relief proposed by the bill, there are three matters of detail affecting the relations of the Union Pacific and the Santa Fe which may be noticed for completeness. The Southern Pacific Company owned the stock of some interior California lines, something over two hundred miles altogether, extending from San Francisco Bay in a general northerly direction. Beyond the northern terminus of these lines, and with a difficult and expensive country lying between, the Santa Fe had some small California lines. The Southern Pacific and the Santa Fe agreed to build, at joint expense, the entire line from the near terminus of the Santa Fe roads, across the gap, to a union with the northern terminus of the Southern Pacific roads, thus making an uninterrupted line from Northern California to San Francisco Bay, and making possible the development of the country served. To that end the various constituent companies, all California corporations, were consolidated under the authority of the Laws of Cali-

fornia (Civil Code of California, Section 473). The consolidated line is owned and operated by the Santa Fe and Southern Pacific jointly. As the President of the consolidated company, a Santa Fe official, puts it in his testimony (Record, p. 525):

> "Our arrangement with the Southern Pacific was simply to save expense. We both staggered at the expense which the surveys disclosed would attend the construction of that line. It is a most difficult country, both for construction and maintenance, and when it came to the question of building two parallel roads into the country, there was not enough in it to make it worth while."

The Santa Fe, under the name of the Phœnix & Eastern, had built some 90 miles of road in Arizona from Phœnix eastwardly, with the avowed purpose, set forth in the Articles of Incorporation of the Phœnix & Eastern, of building to Benson in southeastern Arizona. The Southern Pacific, under the name of the Maricopa & Phœnix, had in contemplation a line from Mesa, a point just east of Phœnix, through Arizona and New Mexico, to Durango, Colorado (Record, pp. 4919-4920). A struggle, legal and physical, took place between the contending interests, growing out of an alleged divergence by the Phœnix & Eastern from its declared plan and route to Benson, and amounting, as was claimed, to a purpose and attempt to invade and occupy Southern Pacific ground in a strategical canyon of the Gila River, essential to the proposed Southern Pacific route to Durango. The final outcome was, that the Santa Fe retired from the controversy and sold the

piece of road, some 90 miles long, to the Southern Pacific. This is made, in the testimony, an incidental cause of complaint against the Southern Pacific Company, although not alleged in the bill or included in the prayer for relief.

At San Francisco, the Santa Fe and Southern Pacific Company were connections of the Pacific Mail. The Pacific Mail apportioned inbound tonnage, 25 per cent to its connection, the Santa Fe, 75 per cent to its connection, the Southern Pacific, answering reciprocally to the outbound tonnage furnished by the respective rail carriers. If the Pacific Mail Company was a third carrier, or if, in view of the Southern Pacific stock interest of 51 per cent, it be assumed to be a part of that system, it is not perceived why, on the one hand, it was not competent to the Pacific Mail to divide the tonnage among its connecting lines, or, on the other, why the Southern Pacific Company, if it is to be identified with the Pacific Mail, could have any relations on Asiatic business at the Port of San Francisco, with the Sante Fe, except as a connecting line (*I. C. C.* vs. *S. P. Co.*, 200 U. S., 536). Some suggestion, however, was made in the record that this division of tonnage at San Francisco might have been by way of inducement to the Santa Fe to retire from the California steamship company which had formerly operated with the Santa Fe in Asiatic business through the port of San Diego. But the suggestion came to naught. The Santa Fe gave the steamship company up because it was a failure (Record, p. 576). The Santa Fe got tired "of holding the bag" (Record, p. 577).

There remains the question of the interest of the Union Pacific in the San Pedro, Los Angeles & Salt Lake Railroad Company, which was the line between Salt Lake and Los Angeles. The Union Pacific owns half the stock, and the Clark interests the other half. The road is a short line or cut-off for the Union Pacific between Salt Lake and Southern California. It had been the purpose of the Short Line—the Oregon Short Line Railroad Company under one corporate name or another, and prior to the Union Pacific re-organization of 1898, to build south to Salt Lake towards California, and in those earlier days the company had actually built its line to a point near the Utah-Nevada boundary, and had graded for further construction into the State of Nevada. The financial depression which led to the receivership and re-organization of 1898 checked the enterprise. In 1902 the interests represented by William A. Clark acquired a few miles of road in Southern California, and projected a line through Nevada to Salt Lake. This stirred the Oregon Short Line to action. It prepared to resume its project of building to California, with the advantage, as against the Clark people, of its constructed line from Salt Lake south to the Nevada boundary. The Meadow Valley Canyon, near the Nevada line, a narrow pass, was sought by both parties as an essential part of their route, owing to the impracticability of constructing and operating two railroads within its walls. The construction force employed by the Clark interests proceeded to take possession of the unfinished grade of the Short Line on which it had spent something like a million dollars. This led to litigation, in which the

Short Line prevailed. Much of the territory in Utah and Nevada was unproductive—practically a desert. There was not business enough to justify the construction of two roads between Salt Lake and Los Angeles. The parties came together and agreed to build the road jointly, half of the stock going to the Union Pacific, and half to the Clark interests. The road was then constructed in the name of the San Pedro Company, and operated under traffic arrangements with the Union Pacific and Southern Pacific. These traffic contracts have been criticized. Their interpretation and effect will be considered in the discussion of the San Pedro case. But they are quite apart from the main question, and they will stand or fall on their own merits. The prominent inquiry is, whether the Union Pacific or the Oregon Short Line was authorized to agree with Clark and his associates to build jointly a line from Salt Lake to Los Angeles, where no line or commerce had previously existed, thereby securing to the Union Pacific a second connecting line into California over and above the relation in that regard which it already occupied towards the Southern Pacific Company. The relief asked against the Union Pacific, by the bill of complaint, is, in substance, the same as the relief sought in respect to the Southern Pacific stock, the Santa Fe stock, and the stock of the Great Northern and Northern Pacific.

The foregoing statement, it is hoped, will be of some aid to the court in affording a general view of the whole case. Were the Union Pacific and Southern Pacific, apart from incidental features here and there,

and in their important and substantial relations, connecting lines? And is that relation a basic fact which explains and lights up the intent and the object of the stock purchase? Is this the fact which characterizes the transactions before the court? Was it the main purpose and the chief effect of the stock purchase to promote and assure the preferred relation of the Union Pacific with the Southern Pacific as a connecting line, to develop both lines in fulfillment of that policy; to expand the trade and commerce to which they ministered; to give the public the benefit of an improved and enlarged service, at lower prices, and in so doing to make some return to those who had invested their faith and money in the properties? The transactions in Northern Pacific and in Santa Fe stock have their own history and explanation; those stocks are gone, and the issue has gone with them; and for the San Pedro case, was there in the main transaction, in the joint action of the Union Pacific and the Clark interests in building one new line, where there was no call for more than one—it may be said, not business enough for one—any restraint of interstate commerce or any infringement in any point of view upon the prohibitions of the federal statute. The large question, it will therefore be seen, is the connective relation of the Union Pacific and Southern Pacific lines, and the importance of that relation to the Union Pacific in the last degree. When that question has been resolved, as we respectfully think it should be, in favor of the validity of the stock purchase, it may not be deemed necessary by this Court to go farther and decide questions of law which are open to discussion in this case

under the federal statute, but there should be a statement of these questions for the full presentation of the case. It will therefore be submitted, in the discussion to follow, that the acquisition and ownership by a Utah railroad corporation of Southern Pacific stock in the market by out and out sale is not within the regulative power of Congress under the commerce clause of the federal constitution, but on the contrary, pertains to the police power of the State and rests between the corporation and the State of its domicil. And again, as a question of law, it will be submitted that the out and out purchase by a Utah railroad corporation of Southern Pacific stock in the market is not assignable to the categories of section one of the anti-trust act either as a contract, a combination or a conspiracy in restraint of interstate commerce; nor can the out and out purchase and sale in the market of such stock be said to be the monopolizing, or the attempt to monopolize, in respect to interstate commerce with which the second section of the anti-trust act is concerned.

We shall now proceed to the discussion of the questions which have been outlined in the foregoing statement.

I.

The Union Pacific and Southern Pacific were connecting lines; they were not competitors in any direct and substantial sense; nor is any unreasonable restraint of trade attributable to their relations consequent upon the stock purchase.

THE QUESTION OF INTENT.

It was the policy of the Union Pacific reorganization, fulfilled in act by the expenditure of over $132,000,000 in eight years, to make the Union Pacific a standard railroad. But for the success and fruits of that policy, the Union Pacific was peculiarly in relations of dependence—on the east, between the Missouri River and the Atlantic Seaboard; in an intense sense, on the west, between Ogden on the one hand, and San Francisco and interior California on the other. The business of the Atlantic Seaboard, and of that eastern interior country which lay between the seaboard zone and the river gateways, had its origin, for all-rail transportation, open to participation by the Union Pacific, on the trunk lines like the Pennsylvania, for instance, and the New York Central. The Santa Fe, with its line all the way to California, could handle the business, unshared with a connection, from Chicago to the Pacific Ocean. The Rock Island, with its line from Chicago to El Paso, could divert that business from the river termini of the Union Pacific at Kansas City or Omaha, and haul it to El Paso, there delivering it to the Southern Pacific for the terminal haul into California. It was when the lines from the St. Louis gateway, or, from that center of larger radiation, Chicago, took the business from the trunk lines to the Missouri River crossings, that

the Union Pacific became a factor in the movement at all. It was upon the lines out of St. Louis, it was notably and in the main on the strong Iowa lines out of Chicago, that the Union Pacific leaned for participation in the west-bound haul. It was not a primary carrier; it was a remote and intermediate agency. Turning, now, from the east to the west, the Union Pacific terminus on west-bound California business, as an intermediate part of the all-rail transportation, was Ogden. Whereas a plurality of carriers, like the Chicago & Northwestern, the Milwaukee & St. Paul, the Burlington, not to mention others, connected with the Union Pacific at the Missouri River, there was but one carrier that connected with it at Ogden for California, there was but one set of rails over which the Union Pacific could send freight into California—the rails of the Southern Pacific from Ogden to San Francisco, and extending laterally north and south, into interior California. While the Union Pacific was dependent peculiarly, exclusively, and altogether, on the Southern Pacific, nevertheless the Southern Pacific, on the other hand, was not reciprocally dependent on the Union Pacific at Ogden, but there had a choice and option of connections between the Union Pacific to Omaha, and the Denver & Rio Grande, with its affiliated line the Missouri Pacific, or other Denver or Pueblo connection, to the Middle West gateways by way of Denver or Pueblo. For the year ending June 30, 1900, and for the year ending June 30, 1901, only two years and three years after the reorganization of the Union Pacific, the freight revenue of the Union Pacific from traffic interchanged with the Southern Pa-

cific at Ogden was, respectively $3,933,555.62 and $4,175,183.52 (Record, p. 4903). Of what avail, the reorganization of the Union Pacific, and the vast expenditure and transformation that followed, if the Union Pacific was to be isolated as an intermediate carrier,—if, in defense and preservation of its property and life, it should not be permitted to acquire stock and voice enough in the Southern Pacific to insure to it permanent relations as a preferred connection? The expansion of traffic that marked the first decade of the Twentieth Century, and tested beyond example the power, equipment and facilities of the American carriers, had been foreseen, measurably at least, by the men who rehabilitated the Union Pacific; but of what avail the relative adequacy of the Union Pacific to these demands, if the Southern Pacific, whose last asset had been hypothecated in 1900 (p. 4872), should be unable to meet the situation on as good a footing? Was the Union Pacific to remain "bottled up" at Ogden? If its Directors were sane men, would they have done else than to make provision to acquire the Huntington stock, even before C. P. Huntington's long life had found its term, or after his death, when the stock, it was understood, as Gould says, would come on the market? The Denver & Rio Grande did not get the Huntington stock, but it had to build, at an enormous outlay, the Western Pacific from Salt Lake to San Francisco, and there still remains for it the work, costly in money and in time, of supplying that main line with branches and feeders into interior California. The disposition of the Huntington stock demanded the vital

intervention, and involved the manifest destiny, of the Union Pacific.

"What was the purpose of the Union Pacific in acquiring this stock?"—was asked of Mr. Kahn (p. 1218).

"A. As I said to you before," Mr. Kahn replied, "I am a pretty poor witness on railroad questions, and whilst I was a Director of the Union Pacific, of course I am not an expert on railroad matters; but I understand in a general way that the main purpose of the Union Pacific in acquiring the Southern Pacific was to be certain of not being shut off at Ogden from reaching San Francisco. At that time it had become quite apparent that the Southern Pacific would not remain an independent line, and that one or the other of the large systems would buy it, would get control of it. Reports had come to all of us of negotiations which were being carried on by the other large systems to acquire the Southern Pacific. It was, as I understood it, of vital importance to the Union Pacific not to be shut off at Ogden, and to continue to be able to use the line from Ogden to San Francisco. Naturally I also understood that the north and south lines in California were valuable feeders. I always understood also—as I say, I am not competent to pass on these questions very well.

"Q. Go on, it is very interesting.

"A. I always understood that the Southern Pacific was bought by the Union Pacific for advantages which

it afforded as a connecting line, and it never entered our minds at that time that it could be in any sense considered a competing line."

But the Huntington stock was an integer. The Sunset Route was reflected in the unit of holding. It was incidental to the acquisition of an interest in the Ogden-California line. The Central Pacific people, as we have seen, built their line, from San Francisco or Sacramento, northward through Roseville to the Oregon line, and acquired, and put on its feet, the bankrupt corporation from Portland south; they built their line into Southern California as well, to the Arizona line, and across Arizona and New Mexico to El Paso; they acquired the lines through Texas to Galveston and beyond to New Orleans, reaching tidewater on the Gulf; they ran the ships between these Gulf ports and New York. The Act of July 1st, 1862 (12 Stat., p. 489), by Section 16, authorized them, in concert with the Union Pacific, "to form themselves into one consolidated company;" but that Act did not tie their hands in further construction; it put no ban on the extension of the Central Pacific to the Oregon line—to the contrary, by the Act of July 25th, 1866 (14 Stat., 239), the northward extension was invited, authorized and subsidized by a land grant. Similarly, the construction into Southern California was authorized and encouraged, to a connection at the State boundary, with the Atlantic and Pacific Railroad by Section 18 of the Act of July 27, 1866 (14 Stat., p. 292); and afterwards to a connection at the Arizona line with the Texas Pacific, by Section 23 of the Act

of March 3, 1871 (16 Stat., p. 573). The Texas & Pacific never got beyond El Paso. It was the Central Pacific people who laid the rails through Southern California to Yuma at the Arizona boundary, and across the Territories of Arizona and New Mexico to the Rio Grande River at El Paso; and from Mojave, in Southern California, to Needles on the Colorado River, connecting with the Atlantic and Pacific at the Arizona boundary. The right to consolidate the organizations granted by the Act of 1862, was not qualified or withdrawn by reference to any further extension of the rails between Ogden and San Francisco. Those rails were extended—to the north and to the south; and the Sunset Route became a part of the railroad line beginning from Ogden and extending through San Francisco, to Galveston and New Orleans. As Mr. Stubbs explained: "Those Southern Pacific lines were built by the promoters and constructors and practically the owners of the Central Pacific; and the Central Pacific continued to operate them until some time along in 1885, when the Southern Pacific Company of Kentucky, the holding company, was organized, and took over all the stocks of both companies" (p. 334), and, as his testimony shows, "there was a unity of interest at all times between the line from San Francisco east as far as Ogden, and the line subsequently built from San Francisco south * * * then again forms a part of the southern route." And further, "practically the same men built them * * * and when the holding company of Kentucky was organized it acquired both of them at about the same time" (p. 334). The Sunset Line, then, equally with

the Central Pacific Line, was involved in the Huntington stock. The purchase of that stock looked primarily to the Ogden-San Francisco line with its feeders in Northern and Southern California; the rail line beyond, making up the Sunset Route entered unavoidably, but indivisibly and incidentally.

Mr. Kahn is asked:

"Q. You did not know that traffic moved to California both ways, both over the Union Pacific and over the Southern Pacific, Sunset Route?

"A. I was not generally posted on these questions. I only know that we bought the Southern Pacific because it was represented to us that it was *a necessary supplement to the Union Pacific*, and if we did not buy it, *the Union Pacific would be bottled up at Ogden*" (p. 1219).

Again:

"Q. Was not the Southern Pacific any inducement, the Sunset Route?

"A. I don't believe it was. I understood at that time that it was a nuisance. It certainly was not an inducement at that time. * * *

"Q. I think you are right, that had been made a nuisance, and because it was a nuisance, and because you wanted a connection into San Francisco for the other reasons you have given—

"A. Excuse me. You put it just the other way on. I said the necessity of acquiring with the Southern

Pacific the line which you call the Sunset Route was the very opposite to an inducement. The Union Pacific did not buy the Southern Pacific because the Southern Pacific contained that southern line, but it bought it in spite of that.

"Q. That is, the southern line was forced on you?

"A. I think that if at that time the southern line could have been cut off from the Southern Pacific, it would have been preferable to all of us" (p. 1219-1220).

Again (p. 1220):

"Q. That feeling that the Sunset Route was a nuisance was never discussed after that time?

"A. I want to make clear that it was not a nuisance to the Southern Pacific, but I want to bring out again that in my mind, and from what I then heard from those more competent to judge than I, the Southern Pacific was acquired because of its connecting features, and not because of that Sunset Route, which at that time was, I believe, not a profitable part of the system.

"Q. And that situation changed, did it, after the new management came into control, so that you ceased to regret having to take in the *competing* (*ad captandum?*) line to the South?

"A. I have no doubt the new management *greatly improved* that road."

Mr. Kahn is further asked:

"Q. And so, for the sake of getting a line 800 miles long, which you regarded as essential to the Union Pacific, you bought six or seven thousand miles, is that the idea?

"A. No; I said the lines in California were doubtless an additional inducement" (p. 1219).

And these California lines included the line from Roseville to the Oregon State Line, 296.58 miles; the lines from Marysville to Knight's Landing, 27.75 miles, Marysville to Oroville, 25.97 miles, Davis to Knight's Landing, 18.64 miles, Woodland to Tehama, 100.84 miles, Willows to Fruto, 16.84 miles; also the lines and branches from Roseville south to the Arizona line, 2,701.21 miles. The mileage from Ogden to Roseville, including branches, is 1,024.62 miles. This makes a total mileage, Ogden to California, including the north and south lines, of 4,212.45 miles (pp. 4944-5).

Mr. Kahn says again (p. 4756):

"If we could have gotten it in any other way we would have preferred it. We needed the Central Pacific, and we could not acquire it in any other way. We tried to, but failed."

Again (p. 4731):

"Q. You also knew, did you not, from your investigation of that matter, before purchasing this stock, that the Southern Pacific owned a majority of the stock of the Pacific Mail Steamship Company?

"A. We knew that had been bought, I believe the year before we acquired the stock, and it was considerably criticised at that time. It was in no way an inducement to buying it, but rather the opposite.

"Q. That is, you felt the act of acquiring the Southern Pacific stock and thus dominating it, and, at the same time, by controlling the Pacific Mail, dominate the Panama route to the Pacific Coast, was a deterrent rather than an advantage?

"A. I would not say a deterrent; it certainly was not an inducement. I know in a general way that at the time the Pacific Mail was bought, the general opinion was that it had been paid for at too high a price, and that it was not a very advantageous investment to the Southern Pacific. It certainly did not in the slightest degree influence us in favor of buying the Southern Pacific, and it was not sufficiently important to deter us from buying it.

"Q. No, I understand it didn't stop you from buy ing it, but the fact that you were acquiring the control of another transcontinental line, namely, the Panama Route, by getting the ships of the Pacific Mail, was not regarded by you as a good thing for the Union Pacific? You did not think it was a good thing for a transcontinental railroad to control that line?

"A. To be quite frank, we did not give it any consideration either way. It did not cut any figure either way." Indeed, as noted in the statement of the case, the Pacific Mail was not engaged in transcontinental

business at all at the time of the stock purchase, it had retired from it, and it was the Union Pacific management—if it be assumed to have been in control of the Pacific Mail—that put it back into that business (p. 3994).

"Q. But you did consider the control of the Sunset Route as a positive disadvantage as I understood you—direct and positive?

"A. 'Positive disadvantage' is putting it rather strong. In my first examination, three years ago, I called it a 'nuisance' and I think that is still the best expression to designate the state of mind with which we then considered that Sunset Route. We knew it would require a great deal of money to be spent on it; we knew that it added thousands of miles to the burden of administration and of management. We were very anxious that the Union Pacific should receive as much of the administrative ability and of the railroad genius of Mr. Harriman as it was possible for him to give it, and we were rather disinclined to put upon him any more burden than was necessary to the best development of the Union Pacific; and therefore, we individually, felt that if the Southern Pacific could be separated, keeping only the Central Pacific and the north and south lines in California, and getting rid of the southern part of the Southern Pacific, we would be getting rid of a nuisance.

"Q. That is, if you could have gotten rid of the *competitive* line by the Sunset Route, it would have been a distinct advantage to the Union Pacific?"

MR. DUNNE: "I object to the question because it assumes that the Sunset line was a competitive line of the Union Pacific. That is a question that will be passed upon by the Court, and I do not think it should be assumed in questions put to the witness."

WITNESS: "Not because of its competitive feature, as you call it. It did not strike us at the time, and I am not clear in my mind at this day, until there is a judicial determination of the question, whether or not the Sunset line was a competitive line or is a competitive line. To demonstrate that competitive feature in no way influenced us one way or the other at the time, before we bought the Southern Pacific, we asked, as we always do, that the legal aspect of the transaction be reported upon by our counsel, as to whether it was an entirely safe transaction for us (my firm, I mean) to undertake, or whether there were any legal obstacles of any kind, and we were informed that the only possible legal obstacle to our acquiring that stock, and the possible acquisition of it by the Union Pacific, if it should so determine, was the question of the Southern Pacific being a holding company and not a railroad company, as otherwise there was not any possible question of any legal obstacle in the way. So the competitive feature never entered our minds."

The Union Pacific was fully alive to the danger that a hostile influence would acquire the stock, and gain an entrance into the management of the Southern Pacific. Mr. Kahn was asked (p. 4712):

"Q. Were you advised or apprehensive of any movement by interests other than the Union Pacific in the

direction of acquiring Southern Pacific stock after his [Mr. C. P. Huntington's] death?

"A. We were apprehensive of that."

Mr. Kahn shows, further, that negotiations for the preferred connection between the Union Pacific and Southern Pacific were in course even before Mr. Huntington's death. "As I say," he proceeds, "the members of the Executive Committee realized some time before Mr. Huntington's death the vital importance to the Union Pacific of a continuation of its old established relations with the Southern Pacific. The entering of a hostile influence into the Southern Pacific, to the extent of controlling it, might have brought with it—very dangerous consequences to the Union Pacific inasmuch as it related to the Union Pacific's free access to San Francisco, for which it had used the Central Pacific for many years. So much so, that Mr. Harriman, in the last year or two of Mr. Huntington's life, made every endeavor to arrange definite relations with Mr. Huntington, so as to assure for all times the permanence and the unaltered relation between the Union Pacific and the Southern Pacific as far as the use of the Central Pacific line was concerned, and in fact he offered to Mr. Huntington on behalf of the Union Pacific, to buy the Central Pacific alone, if a way could be found to separate it from the rest of the Southern Pacific system. That was declined. And there were also declined all other overtures on the part of Mr. Harriman looking to a permanent and definite and unalterable relationship between the Union Pacific and the Central Pacific. When Mr. Huntington died, the

situation became even more threatening, in that we were advised that there were other influences attempting to purchase the Southern Pacific. Therefore, when opportunity presented itself to acquire control or something approximating control of the Southern Pacific, the Union Pacific gladly availed themselves of the opportunity. And they did that because of the vital importance of the connecting feature of the Southern Pacific as represented by the Central Pacific, which gave to the Union Pacific access to the coast of San Francisco, and also the valuable element of the feeding lines in California, north and south" (pp. 4712-4713).

In connection with his testimony touching the apprehensions of the Union Pacific that other interests would purchase the Southern Pacific stock, Mr. Kahn further says:

"Yes, either that, or with the death of Mr. Huntington that other interests would naturally be coming into the Southern Pacific who might be antagonistic to the Union Pacific." He says that "a number of varied interests was mentioned, Mr. Gould, among others. But I would not like to state, unless I am compelled to, who the interests were that we were advised endeavored to get control of the Southern Pacific" (p. 4727).

Further inquiry on this immediate line was reserved for the afternoon session, but Mr. Kahn was asked this question:

"Q. Were you present at any of those negotiations with Mr. Huntington?

"A. It is pretty hard to remember such details ten years back, and I really could not say under oath whether I was or was not present. There were running conferences. Mr. Harriman would meet Mr. Huntington frequently, I might come across Mr. Huntington in his office, and I might come at a time when this matter was under discussion, and I might not. I could not swear—it is a matter of ten years back—whether I had any particular conferences or not, I know that such conferences were held" (p. 2728).

Then he is asked (pp. 2728-9):

"Q. They were held during the year 1900, previous to the death of Mr. Huntington?

"A. Yes.

"Q. He died about mid-summer of that year?

"A. He died about August, 1900, and I think the conferences were held both during 1899 and 1900.

"Q. What was the proposition made by the Union Pacific interests to Mr. Huntington, what did they want?

"A. What the Union Pacific wanted from Mr. Huntington and the Southern Pacific was some way, they did not care which, in which the existing relations between the Union Pacific and the Central Pacific could be put in definite, permanent and unalterable form, so that nothing could happen to the Southern Pacific—Mr. Huntington was an old man—which would affect the possibility of access under existing

arrangements of the Union Pacific to San Francisco by the use of the Central Pacific. The Union Pacific was prepared to accept any reasonable arrangement which would have accomplished that purpose, and which would suit Mr. Huntington, and among the ways thought of to accomplish it was the offer to purchase outright the Central Pacific and leave the rest of the system alone."

Mr. Edwin Hawley was called in rebuttal to say that he had never heard of the negotiations, mentioned by Mr. Kahn, in respect of the purchase of Huntington stock, or other arrangement, looking to the permanency of relation between the Union Pacific and its connecting line. Mr. Hawley had been an Assistant Traffic Manager of the Southern Pacific Company, under Mr. Stubbs, during the lifetime of Mr. Huntington. He was stationed in New York, and naturally had close relations with Mr. Huntington (pp. 4949, 4946). But it is not to be concluded that because Mr. Hawley had never heard of these negotiations, they may not have taken place. Mr. Hawley was asked:

"Q. Did any such matter as that come to your knowledge?

"A. No, sir.

"Q. You never heard of it?

"A. No, *it may have taken place, however*" (p. 4948).

Mr. George E. Miles, also called in rebuttal, who had been Mr. Huntington's secretary with the intimate

relations implied, testified (p. 4958) that Mr. Harriman, on some rare occasions met Mr. Huntington at Mr. Huntington's office, where Miles had a desk. The interviews were very short ones. Miles was asked:

"Q. What was his habit [Mr. Huntington's] as to talking over business matters with you or in your presence?

"A. Well, I very frequently talked with him; *of course sometimes not.*" His attention was called to the testimony of Mr. Kahn touching these negotiations with Mr. Huntington, and he testified: "I never heard of them, no.

"Q. Did Mr. Huntington ever say to you that he had been approached on that subject by Mr. Harriman?

"A. No, he never said so *to me*" (p. 4959).

On cross-examination Mr. Miles again had his attention drawn to Mr. Kahn's testimony and he was asked: "Calling your attention to that testimony, isn't it entirely possible, so far as you are concerned, that just precisely that situation may have existed between Mr. Harriman and Mr. Huntington?

"A. It is possible" (p. 4959).

Mr. Tweed, one of the Huntington executors, was examined very briefly in rebuttal, testified to his intimate relations with Mr. Huntington, and on being asked: "Did any offer by Mr. Harriman to Mr. Huntington to purchase the Central Pacific line ever come to your knowledge?"

"I have no recollection of such an offer having come to my knowledge," he answered (p. 5058). But Mr. Tweed did testify to something—that the Huntington stock was not sold by the executors, or through negotiations with them, but by the beneficiaries, Mrs. Huntington and Mr. H. E. Huntington (p. 5059), neither of whom was called by the Government. Mr. Hawley had testified that it was he who had negotiated the sale of the stock—475,000 shares (p. 4948); and that this was the entire amount, not only of the Huntington holdings but of his own as well; less than 25 per cent of the outstanding issue. Mr. Hawley says that the matter was finally concluded at Mr. Harriman's house, but adds that Mr. H. E. Huntington was also present and, besides, that Mr. Jacob H. Schiff, of the firm of Kuhn, Loeb & Co., was also present, and that it was the firm of Kuhn, Loeb & Co., that paid the money for that stock (pp. 4949, 4951). This bears upon the testimony of Mr. Kahn that the negotiations for the stock "were conducted by us as fiscal agents for the company, and Mr. Harriman" (p. 1215). Mr. Hawley, while testifying that Mr. Schiff was present when the matter was finally concluded, also says, speaking for himself, that Mr. Schiff did not take any part in the negotiations, although Mr. Schiff was present at the consummation, and his firm paid the money. But Mr. Kahn testifies that the negotiations of his firm were with the principal beneficiary, Mrs. A. D. Huntington and with Speyer & Co. (p. 1215). Neither Mrs. Huntington nor Speyer was called by the Government. And Mr. Kahn gives the further and significant circumstance that the executors, one of whom was

Arabella D. Huntington (p. 5068), also principal beneficiary, insisted, in the negotiations with Kuhn, Loeb & Co., upon a condition of which Mr. Hawley does not speak and of which he seems to be in ignorance. Indeed he does not speak with absolute certainty as to who bought the Huntington stock. He was asked:

"Q. And who paid for the Huntington stock?

"A. Kuhn, Loeb & Co., *I think*" (p. 4951).

Now, then, for Mr. Kahn's testimony (p. 1216): "It is a matter of seven years back, and I cannot remember every single step that was taken in that connection, but in a general way we undertook to take the risk of buying that stock. I remember the executors of the Huntington estate *wanted a banker's obligation, and were not satisfied with a corporation obligation;* they wanted a banker's obligation to protect them, and there was a question when a certain amount of cash had to be paid down at once, before the Union Pacific or any other railroad company could act or get together, and we simply stood in the breach and took the risk."

More than all this, the testimony of Mr. Kahn as to the apprehensions entertained by the Union Pacific people concerning hostile acquisition of the Huntington stock, is corroborated and amplified by the testimony of Mr. Gould, called in rebuttal. When Mr. Kahn was asked if Mr. Gould was "trying to buy the Huntington stock," he testified: "Mr. Gould, *so we were informed, was desirous* of buying Huntington stock" (p. 4738). He further testified, that "the other people that we understood were thinking of buying, or were

being urged to buy, rather—I understood were being more urged to buy than they were thinking of buying—were the Burlington people," referring to "Mr. Perkins and his associates" (p. 4740).

Now, for Mr. Gould's testimony. He testifies to his relations with the Gould roads, and to his membership in the Executive Committee of the Union Pacific; and that he was advised at the time, by Mr. Harriman of the pending negotiations for the acquisition of the Southern Pacific stock for the Union Pacific (p. 4953). He was then asked:

"Q. During the time that those negotiations were pending, or at any time after the death of Mr. Huntington, did you approach the representatives of the Huntington estate with a view to purchasing the stock of the Southern Pacific?

"A. No, sir" (p. 4953). But that he was "desirous" of acquiring the stock, and was restrained from personally attempting to buy it, by his knowledge of the Union Pacific negotiations, and a sense of loyalty to his associates on the Executive Committee of that Company; and more than this, that he would have bought the stock if the Union Pacific had not bought it,—is put beyond doubting by his testimony. He is asked:

"Q. But neither in the fall of 1900, nor at any time, *did you personally attempt to buy it?*

"A. No, I would have considered that *disloyal to my associates.*

"Q. Mr. Harriman?

"A. Yes" (p. 4957).

To continue: Mr. Gould testifies to the Missouri Pacific and the Texas & Pacific as Gould properties. The Texas & Pacific, he says, runs through Texas, terminating at El Paso. At its eastern terminus it connects with the St. Louis & Iron Mountain, a Gould property,—at Texarkana, from which point the St. Louis & Iron Mountain takes the rails north to St. Louis, connecting there with the Missouri Pacific; and the Missouri Pacific in turn strikes out westward, to Pueblo, there connecting with the Denver & Rio Grande, also part of the Gould system, which completes the line to Ogden. We thus have the Gould system swinging round through St. Louis from El Paso at the south to Ogden on the north; and the only direct outlet for the system into California whether at El Paso or at Ogden, was over its single rail connection at either point, the Southern Pacific (pp. 4955-6). That Mr. Gould was desirous, therefore, of acquiring the Southern Pacific stock, is obvious enough, and he was prompt to show it. Mr. Gould testifies:

"Q. Is it not a fact that before the Union Pacific purchased the Southern Pacific stock—before the Union Pacific had acquired that stock at all—you notified Mr. Harriman that in the event he did not proceed with those negotiations, you would take that stock for your properties?

"A. No, not in the way you put it, no; I suggested to Mr. Harriman—I did not notify him in the sense

that you use the word, of laying the law down—I suggested to Mr. Harriman *during the negotiations*, that if he did not want the properties—the Southern Pacific —*I would take them for my interests.*

"Q. I quite understand, but I used the word 'notify' simply in the lawyer's sense, that you made him aware of your willingness to take the property in the event that he did not consummate the negotiations with [for] the Union Pacific?

"A. Yes.

"Q. Now, is that a correct understanding?

"A. That is correct.

"Q. When was that, Mr. Gould?

"A. I could not place the date with any absolute degree of accuracy. I should think it was some time in *September or October*, 1900. It was *whilst he was proceeding* with his negotiations with the Huntington estate.

"Q. After Mr. Harriman had accomplished the purchase of the Southern Pacific stock, did you again in any way signify to him your desire to take over any part of that stock purchase?

"A. I suggested to him that *I take a half interest*, or rather, *my interests take a half interest.*

"Q. How soon, in an approximate way, was that after Mr. Harriman had made the Southern Pacific stock purchase?

"A. I should think it was *about that time, about the time he completed it.*

"Q. And, as I understand you, *he declined?*

"A. Yes.

"Q. Did you make any statement along those same lines at the time to any member of the firm of Kuhn, Loeb & Co.?

"A. I think I mentioned it to Mr. Schiff, probably. *Yes, I think I mentioned it to Mr. Schiff*" (p. 4956).

When, therefore, Mr. Kahn testified: "Mr. Gould, so we were informed, was desirous of buying the Huntington stock" (p. 4738), he is corroborated to the letter by Mr. Gould. And when Mr. Kahn testified that the Burlington was a source of apprehension from the same point of view, his testimony is not only corroborated, it is amplified by Mr. Gould, who says:

"Q. You have stated to Mr. Severance that you were friendly with Mr. Harriman at the time of these negotiations, that you were a member with him of the Executive Committee—do you know whether, during the pendency of his negotiations for the purchase of the stock, and before the consummation of the sale, he was apprehensive that other interests, over and above your own interest, were desirous of getting that stock?

"A. Yes, he talked it over with me *several times*, and he was *afraid* that the *Northwestern* would build from the Black Hills. They had a line up to the Black Hills, *and he was afraid the Northwestern would build*

from the terminus of their line through to Ogden, going through a canyon that lies to the north of Ogden, Ogden Canyon, I think the name is, but I am not quite sure. *Then he also used to be afraid of the Burlington building through to Ogden.*

"Q. Is it not a fact that in 1900, after Mr. Huntington's death, it was generally understood among railroad men of your standing and Mr. Harriman's, that the Southern Pacific stock would be sold?

"A. *Yes; I supposed it would come on the market*" (pp. 4956-7).

The finding of the Circuit Court, set forth in its opinion, is unequivocal:

> "The actuating intent and purpose of the Union Pacific Company in acquiring the Huntington stock was to secure a permanent and reliable connection at Ogden for through traffic over the Central Pacific line to the Pacific coast, and thereby to save the necessity for constructing a road of its own from Ogden to San Francisco."

Again, the Pacific Railroad acts apart, which are shown by the Court to have no bearing, it is found by the Circuit Court that

> "the Union Pacific Company had no independent right of co-operation by through route or joint rates with the Southern Pacific for the Pacific Coast trade, and in fact no other direct connection was open to it for that trade except the Southern Pacific road itself."
>
> "The Rio Grande," continues the finding, "and its allied lines and connections with trank lines

from the East at St. Louis, was available to the Southern Pacific as a connection at Ogden for business for the Atlantic seaboard and middle states. To meet a menace occasioned by this situation and secure a reliable and permanent arrangement for Pacific coast business, Mr. Harriman, acting for the Union Pacific Company, first tried to purchase from the Southern Pacific Company the old Central Pacific line extending between Ogden and San Francisco, and failing in this, entered into negotiations with C. P. Huntington in his lifetime, for the purchase of a large block of the capital stock of that company, owned by him. Being unsuccessful in this, he renewed his efforts to secure that stock from Mr. Huntington's heirs and devisees after his death, in 1900. In this effort, he had a competitor in George Gould acting for the Gould interests. It resulted, in 1901 and 1902, in the purchase for the Union Pacific Company of nine hundred thousand shares, and these with the shares of some preferred stock afterwards issued and taken by it, made a holding of a little over forty-six per cent of the total outstanding issue of Southern Pacific stock."

And again the Circuit Court finds:

"The immediate and actuating intent and purpose of the Union Pacific Company in acquiring the Huntington stock and thereby the control of the operations of the Southern Pacific line, were, according to the proof, to secure a permanent, working and reliable connection at Ogden over an existing road for its through traffic, a connection not dependent upon the grace of a dominant copartner, but one within its own control."

For the significance of these findings, made upon evidence that was really all one way, we may turn to the case of *Lawson* vs. *Mining Company*, 207 U. S. 1, 11-12, where as here,

> "The Circuit Court of Appeals made no separate finding of facts, but it filed an opinion which indicated the scope of its decision, and it is the decree of that court which is before us for consideration. The attitude of the case is very like that of one in which a trial court refers all things to a master who takes the testimony and reports it with a general finding for the plaintiff or defendant, upon which report the trial court states its views of the facts and the law and enters its decree. An Appellate Court reviewing such decree will give its consideration to the conclusions stated by the trial court irrespective of the report of the Master, unless the issue be so narrow that sustaining the decree of the court necessarily involves an overruling of the Master on a matter of fact. From the opinion of the Court of Appeals it found that there was a broad vein."

The opinion of the Court of Appeals is excerpted, and this Court then goes on to say:

> "With reference to the conclusion of the Court of Appeals, it is sufficient to say that if the testimony does not show that it is correct, it fails to show that it is wrong, and under those circumstances we are not justified in disturbing that conclusion. It is our duty to accept a finding of facts unless clearly and manifestly wrong."

The Southern Pacific, then, was the connecting line of the Union Pacific into California; it was the only con-

necting line of the Union Pacific into California; the permanent and preferred connection of the Union Pacific with the Southern Pacific was vital to the Union Pacific as an intermediate carrier. The relation of those two lines as connections from the Missouri River to the Pacific Ocean had been the conception and policy of the Government from the first beginning, even to the length of express legislation authorizing the companies to consolidate their organizations. In the old age of Mr. Huntington, with the end not far removed, the reorganized management of the Union Pacific sought to assure and cement the connective relation, and when, with the death of Mr. Huntington, his stock came on the market, the crisis was reached, and it had to be met. The Sunset Route was a constructed and to some extent an acquired extension of the original Southern Pacific; it was blended inextricably with the Ogden line in the disintegrable ownership of the Huntington stock. The Denver & Rio Grande, the Burlington, the Northwestern, filled the Union Pacific with apprehension and moved it to decisive action. The stock was bought, a minority but influential holding. The Union Pacific management and policy, which had made for the success of the Union Pacific, were extended, with the acquiescence of the majority stockholders of the Southern Pacific, to the conduct of the business of that company, to the same end, to the standardizing of the property, not here or there, but everywhere, to the expansion of the traffic and revenue, not at a higher but at a lower cost to the public for the service, and to the establishment of the company, for the first time in its history, on a dividend-paying

basis. This is the outcome of the stock purchase, and of the consequent relation of preferred connections between the two companies. This is of the substance and character of the transaction.

REVIEW OF THE DECISIONS.

Certainly, if the Supreme Court of the United States has made one thing clear in its exposition of the Anti-Trust Act, it is that the restriction of competition at which the act is leveled must be direct in its nature, not remote; substantial, not incidental or relatively unimportant; undue and unreasonable, if any restriction there be. The union of two connecting lines making for better service and better administration; for the expansion of commerce and the welfare of communities, could rarely, if ever, be accomplished in this country under legislation like the Anti-Trust Act, if that legislation were not given a reasonable construction. Some incidental restriction of competition in a spot or in spots, existing, it may be, only in possibility, not in fact, is seldom absent from the inter-relations of railroad carriers in a country traversed and intersected by railroad lines as this country is; some competition in some sense, more or less limited, becomes visible if sufficiently looked for,—however characteristic and substantial the relations of two carriers may be as natural connecting lines. The Anti-Trust Act has not been construed by the Supreme Court of the United States in disregard of the relations and proportions of things, as the *Standard Oil* and *Tobacco cases* notably illustrate. Nor has it been so construed by the circuit courts, as in decisions of which the case of *Whit-*

well vs. Tobacco Company, 125 Fed., p. 458, and *Phillips* v. *Iola Cement Co.*, 125 Fed., 593, are instances. It may be that in some local and remote feature of a railroad company's business, an aspect of competition is presented towards another line, but when that condition is brought into relation with the main and substantial business of the two carriers, and its real bearings in the situation as a whole are ascertained, it is seen to be without significance. It does not express the general character of the relations between the carriers; it is remote ; it dwindles into an incident. If those two carriers are connecting lines in their substantial features, the quality of that general relation will none the less characterize and express the attitude of the companies, unaffected by some circumstance that may be found here or there, at once perceived in its bearing to be incidental and remote only. This is the thought that runs through the decisions from the first beginnings of the interpretation of the Anti-Trust Act and finds recent expression in the *Oil* and *Tobacco cases*.

In *United States* v. *Joint Traffic Association*, 171 U. S., p. 568, the Supreme Court refers to the *Trans-Missouri case* itself as illustrating that restraints of trade, incidental in their character and collateral to the substantive transaction, are not within the statute.

> "The sale of a good-will of a business," says the Supreme Court, "with an accompanying agreement not to engage in a similar business was instanced in the *Trans-Missouri case* as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale, and was entered into for the pur-

pose of enhancing the price at which the vendor sells his business."

The Court also referred to the *Hopkins case* in these words:

"In *Hopkins* v. *United States,* decided at this term, we say that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements, under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or a corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited, *that the act of Congress must have a reasonable construction,* or else there would scarcely be an agreement or contract among business men that would not be said to have, directly or remotely, some bearing upon interstate commerce, and possibly to restrain it. To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri case,* is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert they all restrain trade in some remote and indirect degree, is to make a most violent assumption, and one not

called for or justified by the decision mentioned, or by any other decision of this court."

In *Anderson* v. *U. S.* (171 U. S., p. 615-616), the Supreme Court said:

> "It has already been stated in the *Hopkins case*, above mentioned, that in order to come within the provisions of the statute the direct effect of an agreement or combination must be in restraint of that trade or commerce which is among the several states or with foreign nations. Where the subject matter of the agreement does not directly relate to and act upon interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain that commerce, *but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged*, such agreement will be upheld as not within the statute, where it can be seen that *the character and terms of the agreement are well calculated to attain the purpose for which it was formed*, and where the effect of its formation and enforcement upon interstate trade or commerce, is in any event but indirect and incidental, and not its purpose or object."

In the *Addyston Case* (175 U. S., p. 228) the Supreme Court uses this language:

> "Under this grant of power [Commerce Clause] to Congress, that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations, where the nature and

direct effect of such a contract will be when carried out, to *directly, and not as a mere incident to other and innocent purposes,* regulate to any substantial extent interstate commerce."

And further (p. 229):

"The power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which *directly* and *substantially,* and not merely *indirectly, remotely, incidentally,* and *collaterally* regulate, to a greater or less degree, commerce among the states."

And further (p. 229):

"We fail to find in the language of the grant any such limitation of that power as would exclude Congress from legislating on the subject and prohibiting those private contracts which would *directly* and *substantially,* and not *as a mere incident,* regulate interstate commerce."

In *Phillips* v. *Iolo Cement Co.* (125 Fed., p. 594), it was said by the Circuit Court of Appeals:

"It is now settled by repeated decisions of the Supreme Court that the test of the validity of a contract, combination or conspiracy challenged under the Anti-Trust law is the direct effect of such a contract or combination upon competition in commerce among the states. If its necessary effect is to *stifle competition* or to *directly* and *substantially* restrict it, it is void, *but if it promotes, or only incidentally or indirectly restricts competition in commerce among the states, while its main purpose and chief effect are to foster the*

> *trade and enhance the business of those who make it, it does not constitute a restraint of interstate commerce within the meaning of that law, and is not obnoxious to its provisions. This act of Congress must have a reasonable construction."*

The history of the law touching restraint of trade, its evolution from first and somewhat intolerant beginnings, its gradual and ampler range, its changed and larger view as modified by the economic environment and progress, and its final outcome as gathered up in the ultimate criterion of reasonableness, are traced and exhibited in the opinion of this Court in *Standard Oil Company* vs. *United States,* 31 Supr. Crt. Rep., 502. The context of the Anti-Trust Act, as this Court observed in the *Standard Oil case,* "manifests that the Statute was drawn in the light of the existing practical conception of the law of restraint of trade." It is by the rule of reason, not by some canon of mechanical literality, that the statute is to be interpreted and applied.

> "The statute," this Court went on to say, "evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which did not *unduly restrain* interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference—that is, *an undue restraint.*"

The Anti-Trust Act is broad and generic in phrase; some standard, in the light of history, of legislation, of judicial decision, and of an analysis of

the statute itself, was necessary to give specification and character to a given transaction or course of conduct, sought to be drawn within, or excluded from, the generic enumeration. The statutory provisions, as it was pointed out in the *Standard Oil Case*,

> "called for the exercise of judgment—which required that some standard should be resorted to for the purpose of determining whether the prohibition contained in the statute had or had not in any given case been violated. Thus not specifying," the opinion continues, "but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country, in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case, a particular act had or had not brought about the wrong against which the statute provided."

And again:

> "It may be with accuracy said that the dread of enhancement of prices and other wrongs which it was thought would flow from the *undue limitation* on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal, all contracts or acts which were *unreasonably restricted* of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as justified the conclusion that they had not been entered into or performed *with the legitimate purpose of reasonably forwarding personal*

> *interest and developing trade*, but, on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do *wrong* to the general public and to limit the *rights* of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy."

In the case of the *United States* vs. *American Tobacco Company*, 31 Supr. Ct. Rep., 632, this Court said of the *Standard Oil Case:*

> "In that case, it was held, without departing from any previous decision of the court, that, as the statute had not defined the words, 'restraint of trade' it became necessary to construe those words—a duty which could only be discharged by a resort to reason."

And again, on a survey of the record in the *Tobacco Case*, it was said:

> "In truth, the plain demonstration which this record gives of the injury which would arise from, and the promotion of the wrongs which the statute was intended to guard against, which would result from giving to the statute a narrow, unreasoning, and unheard of construction, as illustrated by the record before us, if possible serves to strengthen our conviction as to the correctness of the rule of construction—the rule of reason—which was applied in the *Standard Oil Case*, the application of which rule to the statute we now, in the most unequivocal terms, re-express and reaffirm."

The Constitution of the State of Georgia prohibited the purchase of stock of one corporation by another, or any contract between corporations, tending to restrict competition. The Central of Georgia Railway Company took over the interest of the Middle Georgia Railway Company in a railroad line which crossed the line of the Central Company, and the case went off on the question whether competition had been restricted. (*State* vs. *Central of Georgia Railway Company*, 35 S. E., 37). The Court said:

> "Doubtless, in the purchase of *connecting lines* and branch roads, competition was lessened at given points, but the general effect of these consolidations and connections has really been to increase competition; has added greatly to the public convenience and furnished greater and more commodious facilities for travel; has operated to reduce the cost of transportation; has brought remote parts of the country in close proximity, as it were, to each other; has developed resources that would otherwise have remained dormant, by opening up to the markets of the world the products of the land; and has generally contributed to work to the welfare and prosperity of the people."

And again:—

> "So, at last, the judiciary would be driven to the necessity, whenever the contest was made, in determining whether or not such contracts were legal, of deciding the question as to whether they were between competing lines, and *not simply lines that had competing points where competition was lessened to a degree insignificant when compared to its increase at various other points, and the*

benefits to the public generally along the line of transportation."

And in the syllabus, by the Court, in the same case, it was said:

> "The competition, the defeating or lessening of which paragraph four, section two, article four of the constitution, so far as applicable to railroad companies was designed to prevent,—was competition between lines of railroad, *viewed with reference to their general business in and through the territory traversed by them, and not competition which might incidentally exist at mere points or particular places.* A combination of railroad lines, whatever the form adopted for bringing it about, is not violative of this paragraph of the constitution, even though it might lessen or defeat competition at some point or points *if, as a general result of the combination, the public at large, as distinguished from the people of special or particular communities, was in consequence benefitted."*

In *Kimball* v. *Railway Company* (46 Fed., 888, 890), it was said by the Court,

> "when the statute speaks of competing roads, it evidently means roads that are *substantial* competitors for business";

and in *Rogers* v. *Nashville Railway Co.* (91 Fed., p. 318), it was said by the Circuit Court of Appeals, in speaking of two lines of railway alleged to be competitive:

> "Looking to the territory occupied by these lines of railway, taken as a whole, and the commerce which would naturally flow over the lines as orig-

inally constructed; whether this commerce be regarded as through shipments or local traffic, the lines are in no sense competitive. *If the fact that, by intersection with another line, they may in that way to an extent compete for such business as is incidentally furnished intersecting lines, renders them competitive, it would virtually result that all lines of railway in the country would be competitive in a legal sense, while they would not be so according to a common understanding nor in the sense of commerce.*"

TRANS-CONTINENTAL TRAFFIC.

What is there in the traffic and revenue pertaining, severally, to these two companies, to transform the substantial nature and object of the stock purchase, and to metamorphose it from the character of a vital connective relation into a scheme for the suppression and destruction of competition?

A carload of hardware, going *to* California, may pass over the Union Pacific between Omaha and Ogden, thence over the Southern Pacific from Ogden to its California destination. Again, a carload of dried fruit, going *from* California, may pass over the Union Pacific between Ogden and Omaha—first, however, passing over the Southern Pacific from its California point of origin to Ogden. In either case, speaking in 1901 and 1902, this carload of freight, going or coming, which went over the Union Pacific between Omaha and Ogden or conversely, could get into California or get out of California only over the Southern Pacific to or from Ogden. In other words, the Union Pacific and

Southern Pacific are connecting lines on this business, and it is only because they are connecting lines, that the Union Pacific can haul a pound of the freight. If the Union Pacific, instead of connecting with the Southern Pacific at Ogden, had stopped 130 miles east of Ogden at Granger, that California business, westbound or east-bound, would have gone over the Denver & Rio Grande to or from Ogden, with the Southern Pacific as the constant and exclusive factor between Ogden and California. It would seem to be a paradox on the mention of it, but the only substantial business in this case, for which it is claimed the Union Pacific and Southern Pacific are competing, is this very business by way of Ogden as to which the Union Pacific and Southern Pacific are connecting lines and as to which the only connecting line the Union Pacific had was the Southern Pacific.

How is this claim spun out? The business in question to and from California has origin and destination in the Atlantic Seaboard—east, that is to say, of a line drawn through Buffalo and Pittsburg; and again in the interior between this seaboard line and the Middle West gateways, say, Chicago and St. Louis, sometimes called Central Freight Association territory. The westbound hardware, the keg of nails, may originate in New York—that would be seaboard business. Or it may start from Pittsburg—that would be interior business. The dried fruit, east-bound from California, may go to Cincinnati, or to Pittsburg, or to Buffalo; or it may find its destination farther east, in the seaboard district, at New York or Boston.

"The Atlantic Seaboard territory," says Mr. L. J. Spence, General Eastern Agent at New York of the Southern Pacific Company, "embraces all territory east of a line drawn from Toronto, Canada, through Buffalo, following the western boundary of New York State, down through Pennsylvania just east of Pittsburg; Wheeling, West Virginia; Charleston, West Virginia; —to the southern boundary of Virginia at about Bristol, Tennessee; and north of a line drawn thence east by the southern boundary of Virginia to the Atlantic Ocean" (p. 3988).

Central Freight Association territory "took in the lines practically west of Pittsburg and east of Chicago and St. Louis" (p. 2951).

Prior to 1901, and since, the Ohio River seems to have been a natural line of division between the north and south in Central Freight Association territory. Most of the business north of the river moved through the Ogden gateway; most of the business south of the river through New Orleans and El Paso: in either event passing into California over the Southern Pacific as the sole connecting line, whether at Ogden on the north, or at New Orleans or El Paso on the south. Lines like the Louisville & Nashville and the Queen & Crescent, serving this interior territory, south of the Ohio River, drew the business to the southern gateway, like New Orleans; that was the natural gravitation of the business (pp. 2955, 2956). A portion of the traffic from the territory north of the river did go through New Orleans, but the substance of that traffic

its larger portion, went through the northern gateway: that was the natural condition (p. 2956). The policy of the Union Pacific management, since 1901, has been along these respective lines of natural commercial gravitation (p. 2956). This is not a stockholder's suit, but no stockholder of the Southern Pacific, either before or after he began to collect his dividends, has been heard to complain.

So much, for the Atlantic Seaboard, and for the Central Freight Association or interior territory. Now, for this theory of competition between the two connecting lines on business through Ogden, from or to the seaboard or the interior. New York would be a representative seaboard point. Pittsburg would be a representative interior point, and north of the Ohio River at that. Some business from Pittsburg might be handled through the New Orleans gateway over a southern line, connecting there either with the Southern Pacific or the Texas & Pacific. The Southern Pacific would take the business from New Orleans, via El Paso, to California. If the Texas & Pacific got it at New Orleans, it would have to let go of it at El Paso to the Southern Pacific, the only connecting line it had into California. The New Orleans gateway, therefore, meant that the Southern Pacific Company in interior business, from Pittsburg—or for the matter of that, from any point south of the Ohio River—or to Pittsburg or any south point,—was a connecting line in the haul and a connecting line which could not be dispensed with, because it was the only one of its kind. But the theory is—this theory of competition—that the through

line from Pittsburg via New Orleans to California, or conversely, of which the Southern Pacific was a participating and connecting line, made the Union Pacific a competitor of the Southern Pacific because some Pittsburg business, in either direction, might move over a through line via Ogden, of which the Union Pacific was an intermediate member but of which also the same Southern Pacific was likewise a connecting line, as much so, and as indispensably so, between Ogden and California as between New Orleans or El Paso and California. Of course, if this makes the Union Pacific a competitor of its connecting line the Southern Pacific, it would seem as if it ought to make the Union Pacific, in a case where the Texas & Pacific got the haul from New Orleans to El Paso, a competitor of the Texas & Pacific; and again, if the Louisville & Nashville got the haul from Cincinnati to New Orleans, and the Pennsylvania the haul from Pittsburg to Cincinnati—a competitor likewise of the Louisville & Nashville and the Pennsylvania, and if the Union Pacific, under this theory of competition, is a competitor of the Southern Pacific, it is only fair to turn about and say, that the Texas & Pacific is a competitor of the Southern Pacific; for if the Pittsburg steel girder goes over the Union Pacific and Southern Pacific through Ogden, it will hardly pass through New Orleans and over the Texas & Pacific to El Paso. And if the Texas & Pacific is a competitor of the Southern Pacific, it would seem as if, also, it was a competitor of the Union Pacific, a road between Omaha and Ogden, or of the Chicago and Northwestern, a road between Chicago and Omaha. The situation seems to be full of possibilities.

The same thing is to be said of seaboard business, to or from California, picked up or laid down, for example in New York. The ships of the Sunset Route would take that business to New Orleans or Galveston; it would go thence over the Southern Pacific into California. If the trunk lines got that business at New York it would go through the Middle West gateways, Chicago and St. Louis. Thence, it would have to go to Kansas City or Omaha for the Union Pacific to be in touch with it—for instance, by the Northwestern from Chicago to Omaha. But the moment the Union Pacific got the business, it became Southern Pacific business, for the Union Pacific could take part in the business to California only through Ogden, and as a connecting line of the Southern Pacific. Whether, therefore, the business went south via New Orleans or Galveston, and thence through El Paso, or north, via Omaha and Ogden, the Southern Pacific Company was indispensable to the haul—if it did not take the freight all the way from New York, ship and rail, via New York or Galveston, it still could take it—assuming the Union Pacific to participate in the haul—as a connecting line of the Union Pacific at Ogden, and as the one connecting line that made it possible for the Union Pacific to be in the business at all.

But we do pass from a relation of connecting lines—connecting lines of the Southern Pacific whether at the south or at the north,—the moment we begin to reckon with the Santa Fe, whether the business from Pittsburg or New York went by the St. Louis gateway and thence to Kansas City, or through the Chicago gateway; for

the Santa Fe had a line of its own all the way from Kansas City, and all the way from Chicago, to California. Take a shipment, for simplicity of illustration, originating at Pittsburg or New York, and going to California by way of Chicago—hauled by the Pennsylvania from Pittsburg to Chicago, or by the New York Central, for instance, from New York to Chicago. If the Santa Fe gets the haul from Chicago to California, the Southern Pacific is no longer a *sine qua non*, a connecting line without which the carriage cannot be completed. The Santa Fe has its own line, all the way,—unlike the Union Pacific, it is not a connecting line of the Southern Pacific, depending wholly on its connection. The relation of the Union Pacific and Southern Pacific as connecting lines, is at once emphasized; for with that freight out of Chicago, pulled west by a Santa Fe locomotive, both Union Pacific and Southern Pacific are out of the running. Again, looking in the oposite direction, a shipment of canned goods starts from San Francisco, bound for Pittsburg or New York. If it starts on the Santa Fe, it goes all the way to Chicago; neither Southern Pacific wheels nor Union Pacific wheels turn a single revolution under it. It may go by the Southern Pacific to New Orleans, thence by rail or water to destination; the contest is between the Southern Pacific and the Santa Fe. But if it is to go Union Pacific, it can only go over the Union Pacific as a connecting line of the Southern Pacific, and just because it is a connecting line of the Southern Pacific.

When the Union Pacific bought the Southern Pacific stock, the Southern Pacific Company was shipping

oranges grown in California, to eastern destinations—to Pittsburg, among other places, and to New York. So was the Santa Fe. Of course, if the Santa Fe got the oranges, it took them to Chicago; the Southern Pacific did not carry a box of them, and, obviously enough, the Union Pacific did not either. And if the Southern Pacific got the oranges, the Santa Fe had to look for some other business—that shipment was gone from it forever. But how about the Union Pacific and the Southern Pacific? On this somewhat far-fetched theory of competition, the Union Pacific and the Southern Pacific are competing lines. But the Union Pacific can participate in the haul of those oranges only as a connecting line of the Southern Pacific through Ogden. But the Southern Pacific has other connecting lines, the Texas & Pacific and the Rock Island at El Paso. All of the oranges do not go by way of Ogden; the El Paso gateway gets a share, and the lines connecting there—Texas & Pacific or Rock Island. Is the Texas & Pacific a competitor of the Southern Pacific in the orange business? It is a connecting line. In precisely the same way on this same orange business, the Union Pacific is a connecting line of the Southern Pacific. The Southern Pacific has simply two sets of connections—at Ogden and El Paso. On the orange business, that we have been speaking of, the Southern Pacific Company is an essential party to the through rate with both sets of connections. Are the connections, therefore, competitors between themselves? And if they are not, are they or either of them competitors of their common connection and exclusive connection, the Southern Pacific?

The *Orange Routing Case*, 200 U. S., p. 536, has an interest at this point. The Southern Pacific and the Santa Fe were the primary and initial carriers for the oranges grown in Southern California and shipped to the East. The Southern Pacific had its terminus at Ogden and again at New Orleans. The Santa Fe had its terminus at Chicago. The Southern Pacific, at the Ogden terminus, had its two connecting lines, the Union Pacific and the Denver & Rio Grande; these two connecting lines, in turn, had their own connecting lines to the East, the Union Pacific connecting for instance with the numerous lines out of Omaha; the Denver & Rio Grande, with the lines out of Denver and Pueblo; and still further these Omaha and Denver and Pueblo lines connected with the various lines radiating eastward from Chicago and St. Louis, not to speak of other gateways. The Santa Fe, likewise, connected with the various lines out of Chicago, out of Kansas City, or other points of junction on its line between California and Chicago. Again, the Southern Pacific, at the New Orleans terminus, connected with the lines out of New Orleans, like the Louisville & Nashville and the Queen & Crescent, and these, again, had their ulterior connections; and again, at junction points on the line to New Orleans, the Southern Pacific connected with various lines as, for example, with the Texas & Pacific and the Rock Island at El Paso, and these, in turn, with the lines beyond. Over these numerous through lines, the oranges moved to the eastern cities, on a joint through tariff, less, of course, than the sum of the locals, which was divided conventionally among the participating carriers. There

had been competition among these connecting carriers —active, keen, incessant—of a sort, but an unlawful sort. The connecting lines, in order to draw a carload of oranges to their particular rails, would pay the orange shippers so much money per car for instructing the initial carrier, Southern Pacific or Santa Fe, to route that car over a particular road. This money came out of the division of the through rate, which would accrue to the particular carrier on the haul. The through rate, as required by the Interstate Commerce Act, was a published rate, which the shipper was under a duty to pay in full, and which the carriers were under a duty to exact without deduction. Hence the payment by a connecting carrier to a shipper of a part of that through rate, enabled the shipper to discount the published tariff, and give the connecting line the business. It was a purchase of the business out of the proceeds of the lawful rate—it was a rebate of the plainest kind. What one did, all did. It was admitted that one shipping company "had in four years received rebates to an amount of over $174,000." The situation was intolerable, and the initial carriers determined to put a stop to it. This led to the routing rule.

It was made a rule and stipulation of the agreement between the initial carrier and the connecting lines—who came in and consented to the arrangement—that the through rate, at that time $1.25 per hundred pounds, should be qualified by the proviso that, in all cases, the routing of the oranges over connecting lines, beyond the junction points or termini of the initial carriers, should be in the hands, not of the shippers, but

of the initial carriers. The connecting lines were no longer able to buy the routing from the shipper with rebates. The apportionment of the business among the connecting lines was placed in the hands of the initial carrier.

The shippers resented the new routing rule, and brought a proceeding before the Interstate Commerce Commission for the reinstatement of the old order of things in respect to routing. Upon grounds, not material to the present consideration, the Commission resolved in favor of the shipper's right to route—a different view being taken by the Supreme Court of the United States. But when the case found its way from the Commission to the Circuit Court, in an application by the Commission for an order or decree of the Circuit Court enforcing the order of the Commission, that Court went off on a new ground, without reference to the views of the Commission. The position of the Circuit Court turned on an assumed suppression of competition among the connecting lines by the convention for the routing rule to which they and the initial carriers had been parties, and it is set forth succinctly by the Supreme Court as follows (p. 557):

> "But the Court held, as a result [of the routing rule], that this routing provision, being part of the *through rate tariff, agreed to by the various Eastern roads,* made a contract *among those roads* for the pooling of freights on *competing railroads* within the meaning of Section 5 of the Commerce Act. It held that it was not necessary in order to form a pool, that the contract or agreement should fix the percentages of freight the several

> railroads were to receive, or that the railroads should *know in advance* what the percentages should be; that it was sufficient to constitute a pool if the contract or agreement provided for *special means or agencies* for apportioning freights, which would destroy the rivalry which would otherwise exist between the *competing railroads;* and an agreement by which the apportionment was left to the will of the initial carrier accomplished that purpose as effectually as though definite percentages were fixed in the contract; that defendants' plan to maintain through rates through the operation of the routing rule necessarily destroyed *competition,* and the adoption of the routing rule put the shippers in a position where their patronage could not be *competed for* by the defendants' *eastern connections.*"

Thus, although neither through rate nor through service was individually made or furnished by the connecting carriers, it was held by the Circuit Court that they were, *inter sese,* competing lines on the through business. The Southern Pacific, to illustrate, had the two connecting lines at Ogden—the Union Pacific and the Denver & Rio Grande; and at the junction point, El Paso, it had the connecting lines—Rock Island and Texas & Pacific. These four connecting lines, in the view of the Circuit Court, were competing lines on the California business. The Circuit Court, however, did not go the length of holding that these competing lines, *inter sese,* as it regarded them, were competitors of their common connection, the Southern Pacific, nor did it suggest that the Southern Pacific looked at from the direction of El Paso, was a competitor of itself looked at from the direction of Ogden.

The right of the Southern Pacific to make, or to decline to make, a joint rate with any one of these connecting lines, whether at Ogden or El Paso—to open or to close the gateway to any one of them—was fully conceded, recognized and emphasized in the opinion of the Supreme Court.

> "It is conceded," says the Supreme Court, "that the different railroads forming a *continuous line* of road are free to adopt or refuse joint through tariff rates. The *Commerce Act* recognizes such right, and provides for the filing with the Commission, of the through tariff rates, as *agreed upon* between the companies. The whole question of joint through tariff rates, under the provisions of the Act, is one of agreement between the companies, and they may, or may not, enter into it, as they may think their interests demand. And it is equally plain that an initial carrier may agree upon joint through rates with one or several connecting carriers, who *between each other* might be regarded as competing roads. It is also undoubted, that the common carrier *need not contract to carry beyond its own line,* but may there deliver to the next succeeding carrier, and thus end its responsibility; and *charge its local rate* for the transportation. If it agree to transport beyond its own line, *it may do so by such lines as it chooses*" (pp. 553-4).

Again:

> "Having this right *to agree* on a joint through tariff on terms *mutually* satisfactory, we cannot find anything in the Commerce Act which forbids the agreement with such a condition therein as to routing" (p. 54).

And again (p. 556):

> "The important facts that control the situation are, the carrier need not agree to carry beyond its own road, and may agree upon joint through tariff rates or not, as seems best for its own interests. Having these rights of contract, the carrier may make such terms as it pleases, at least so long as they are reasonable and do not otherwise violate the law. We think the routing rule is not unreasonable under the facts herein and that it does not violate the third section of the Act."

The right, then, of the Southern Pacific to agree, or to refuse to agree, with the Union Pacific or the Denver & Rio Grande, or the Texas & Pacific, or the Rock Island, upon a joint through rate for California, for instance—to let one of them in, to shut the other out—is admitted and confirmed by this case, as it had been in earlier cases like the *Atchison Case* in 110 U. S. 667. It was after the decision of the *Orange Routing Case,* and by the Hepburn Act of 1906, amending the Commerce Act, that for the first time, by express legislation, an administrative body, quasi-legislative in aspect, was authorized to require connecting carriers to form a through route upon a joint rate, and to fix the rate and its divisions where the connecting carriers were unable to come together—and this only where no other satisfactory through route already existed.

The Supreme Court now proceeds to examine the position taken by the Circuit Court:

> "The Circuit Court," it is said, "in order to arrive at its result, necessarily treated the *con-*

necting carriers as rival and competing transportation lines for this freight, and assumed that between these lines there would exist, but for the routing agreement, a *competition* for the fruit transportation which could not be extinguished by any agreement as to routing, as a condition for making through tariff rates; that as *competition* was destroyed by this rule, it was idle to say that such result was not intended by the defendant, and so it was held that the carrying out of the routing agreement violated the act.

"We think these various roads were really *not competing roads* within the meaning of the fifth section of the Commerce Act, when the facts are carefully examined. That act recognizes the right of the carriers to agree upon and provide for the publication of joint through tariffs between *continuous roads*, on such terms as the roads *may choose* to make, provided, of course, the rates are reasonable and no discrimination or other violation of the Act is practiced. The initial carrier did not, on its line, reach the eastern markets but it reached *various* connecting railroads which did reach those markets. The initial carrier had the right to enter into an agreement with *all* or *any one* of these connecting companies, though such companies were competing ones *among themselves*. And the agreements could be made upon such terms as the *various* companies might think expedient, provided they were not in violation of any other provision of the Act."

Again:

"Prior to the adoption of the routing rule, these connecting railroads were already acting under a *through rate tariff* which continued up to the time

when the agreement for the routing was adopted. *When so acting,* it was no longer possible to *compete with each other,* as to rates [and it is upon the rebates as to rates that this whole controversy is founded], provided the companies fulfilled their joint rate tariff agreements. The only way the rate competition could exist under the through rate tariff was by violating the law. This, unfortunately, was habitually done, and during that time the *competition* consisted in a rivalry between these roads, as to which would be the greatest violator of the law by giving the *greatest rebates.*

"In truth, the only way in which these connecting lines could legally become competing railroads for this California fruit trade would be in the absence of all joint tariff rate agreements."

It certainly ought to be clear enough, apart from the relation, competitive or not, of the connecting lines *inter sese,* that their common connection, the Southern Pacific, was not a competitor on California business of its own connecting lines, whether at the Ogden or New Orleans terminus or the El Paso junction.

"Out of the mouth, the heart speaketh." It was unconsciously testified and acknowledged by counsel for the government in his examination of Mr. Ross Clark, a Vice President of the San Pedro Company, that the relation between the Union Pacific and the Southern Pacific in respect to the California business—all of which as between these two lines was local to the Southern Pacific rails—was distinctly a non-competitive relation. It came about in this way; In the consideration of the joint ownership and construction

of the San Pedro road, some traffic agreements were brought into question. One of these stipulations provided that the Union Pacific, in acknowledgment of the uncapitalized value of the Utah mileage of the Oregon Short Line as having fed its main line, was accorded the right to name through rates by way of the Union Pacific (or Short Line) and San Pedro as connections, in and out of Utah from and to local points on the San Pedro line; with a reciprocal right to the San Pedro to name the through rate, by way of these same connections, as from Denver to Provo in Utah, for example, when necessary to meet competition, as from the Denver & Rio Grande Railroad, which ran between these two points. But the right covenanted to the Union Pacific viewed baldly and out of relation, was a right to name the through rate from and to local points on the San Pedro, and this excited the animadversion of counsel for complainant, who regarded, correctly enough, those local points as being non-competitive between the San Pedro and the Union Pacific, and who was challenging the position of the San Pedro for having given away, as he would have it appear, its non-competitive business in Utah to the rate-making department of the Union Pacific. His examination of Mr. Ross Clark (pp. 642-3) is as follows:

After reading the stipulation,—

"Q. You are familiar with that, are you, Mr. Clark?

"A. Yes, sir.

"Q. And you were familiar with that?

"A. Yes, sir.

"Q. And you knew that unless it was necessary to make a change in those rates by reason of the competition from some outside line, the Union Pacific Company and the Short Line—they're all together of course, the Short Line being owned by the Union Pacific—should have a right to make all the rates, the through rates, both in and out of Utah, in connection with your road?

"A. That is as I understand it.

"Q. And you knew that, in the first instance, in making these rates you would have nothing whatever to say, did you—you understood that, did you?

"A. Well I expect we would have to be governed by what the contract provided.

"Q. You understood that at the time, did you, that you were giving away to them the right to make the rates in and out of Utah?

"A. Yes, sir.

"Q. *To points on your line?*

"A. I understood that.

"Q. And that that was absolute to *non-competitive points* and as to the competitive points [meaning points competitive with another road, like the Denver & Rio Grande at Provo] a change to meet competition only?

"A. That is my understanding."

Now, then, if points on the line of the San Pedro Railroad Company in Utah, which were not reached by the Union Pacific, were, as counsel calls them, local points, "points on your line," and if, again, such points on the San Pedro line, as between that line and the Union Pacific, were, in counsel's language, "non-competitive points," is not this just as true of the situation in California, if we substitute California for Utah and the Southern Pacific Line for the San Pedro Line. Is not a point like San Francisco, as between the Southern Pacific and the Union Pacific, a local point on the Southern Pacific line, and as between that line and the Union Pacific, a non-competitive point? Has not counsel in his examination of Mr. Clark conceded, and with entire correctness too, that the relations between the Union Pacific and the Southern Pacific on California business must necessarily be non-competitive?

As the Southern Pacific was the only connecting line the Union Pacific had in and out of California, and as, therefore, every California point, as between the two companies, was a local point on the Southern Pacific "points on your line," it is obvious enough, so far as the Union Pacific is concerned, that the California points were "non-competitive points." Was the city of San Francisco a point on the Southern Pacific line in California, a non-competitive point; or the city of Sacramento, or of Red Bluff, or of Marysville, or of Oroville (p. 4544); or of Fresno, or Bakersfield, or Los Angeles; or any other point on the Southern Pacific line in California, north, south, east or west—as between the Southern Pacific and the Union Pacific? Was the

Union Pacific a competitor of the Southern Pacific on business to local, "non-competitive" points "on your line," to which the Union Pacific had but one connecting line, the Southern Pacific, and which were a thousand miles removed from the Union Pacific terminus at Ogden? When the competition between the Southern Pacific and the Union Pacific in Oregon, south of Portland, is spoken of—the river boat competition along the Willamette River—the area of that competition, such as it was or is, was treated on all hands as not extending farther south than 50 or 60 miles below Portland. With that exception the Willamette Valley was regarded on all hands as a group of points local to the Southern Pacific; and, of course, this is just as true, going still farther south, of the Oregon country between the Willamette Valley and the California State Line, of points like Ashland, for instance and Grants Pass. Ashland is at the California State Line; Grants Pass, about 100 miles north into Oregon. Was Grants Pass a local, non-competitive point on the Southern Pacific? Could the Union Pacific get into Grants Pass except over the rails of the Southern Pacific?

The loose and uncritical use of the word "competition," as witnesses have employed it in this record, in its application to the Union Pacific and Southern Pacific, is, therefore, disclosed and exposed, "when," to use the language of this court in the *Orange Routing case, supra,* "the facts are carefully examined." Take a man as intelligent as Paul Morton of the Santa Fe—not given, perhaps, like a man with forensic or judicial

training, to the more precise analysis and measure of terms. He was asked the question (p. 809):

"Q. Taking into consideration the situation of all those railroads you have mentioned and with which you are familiar, will you state whether in your opinion, in the spring of 1901, prior to the time that the Union Pacific purchased a large amount of stock in the Southern Pacific, the Union Pacific and the Southern Pacific were competitors for transcontinental business?

"A. They were both competitors and connections.

"Q. They were competitors, were they?

"A. Yes."

Much in the same way, he speaks, in passing, of the Santa Fe "competing for Eastern business with the Southern Pacific," "when your line ended at Mojave and you went up to San Francisco over the lines of the Southern Pacific" (p. 813). Mojave is a point in Southern California. Between Mojave and San Francisco, the Santa Fe was compelled to use the rails of the Southern Pacific—they were so far forth connecting lines, so obviously so, that when the Santa Fe sought San Francisco business, not as a connection, but as a competitor of the Southern Pacific, it acquired its own constructed line between Mojave and San Francisco. Mr. Morton points this out on his cross-examination (p. 817); and he adds (p. 818):

"Q. Prior to that time you had no method of doing business to San Francisco except in connection with the Southern Pacific, had you?

"A. *That is the only way we did business there.*"

Now, then, Mr. Morton, on cross-examination, is brought down from the "slippery" generality of the term competition to the underlying fact. He is asked (p. 819):

"Q. Isn't it true, Mr. Morton, that it would be impossible for the Union Pacific to compete for any California business except in connection with the Southern Pacific from Ogden to San Francisco, leaving out of consideration for a moment any possible line by way of Portland?

"A. I think it would be impossible for them to do so with any success.

"Q. Well, the competition that the Atchison had to meet, outside of the competition of the Sunset Line by way of New Orleans, was the competition of the all-rail line, was it not?

"A. Yes, sir.

"Q. Of which the Southern Pacific line from Ogden to San Francisco was part? That is true, is it not?

"A. That is right.

"Q. No rate could be made lawful by any line, except the Atchison, to San Francisco, without the consent of the Southern Pacific Company?

"A. No; *the rates actually were in the hands of the Southern Pacific Railroad.*

"Q. It always controlled the rates to California except as against the Atchison, did it not, Mr. Morton?

"A. Yes, sir.

"Q. And that was because it owned the line from Ogden or operated the line from Ogden to California points, and the Sunset Route being the only line outside of the Atchison?

"A. *They controlled the situation. They had the matter in their own hands.*"

Take a Pittsburg witness, for example, Mr. Belleville, Traffic Manager of the Pittsburg Plate Glass Company, who speaks of the respective soliciting agents of the Union Pacific and Southern Pacific at Pittsburg. The Southern Pacific solicitor would naturally prefer to have the freight go to the Pacific coast by way of New Orleans, because that would give the Southern Pacific a longer haul than through Ogden. But this same solicitor, if he could not get the longer haul, would work shoulder to shoulder with his connection the Union Pacific, to move the freight through Omaha and Ogden as against the competitor of the Union Pacific—Southern Pacific connecting line—that competitor was the Santa Fe, and the Union Pacific was in the competition and could only be in the competition as a connecting line of the Southern Pacific. Now, Mr. Belleville, on direct examination (p. 1361), is asked in reference to the respective soliciting agents of the Union Pacific and Southern Pacific on the theory,

apparently, that the Southern Pacific preference, as between two sets of connections for the longer haul by way of New Orleans, made it a competitor of its connecting line, the Union Pacific, at Ogden.

"Q. Were these gentlemen competing with each other for coast business then?

"A. Yes, sir."

Now, on cross-examination, he testifies:

"Q. His solicitation was really against the Atchison, was it not, Mr. Belleville?

"A. No; I think it was against the Union Pacific as well as the Atchison. The Union Pacific was the strong competitor at that time for the Pacific coast business, much stronger than the—

"Q. Competitor for what?

"A. Particularly in the early days, from 1898 to 1901.

"Q. You have had some experience as a railroad man, in addition to traffic manager for shipments?

"A. Yes, sir.

"Q. You say that the strong competitor was the Union Pacific. You mean competitor for what?

"A. Competitor of the Southern Pacific for coast business.

"Q. Was it any stronger than the Santa Fe?

"A. I regarded it so at that time. That was in 1898.

"Q. Don't you mean that the line *made up of the Union Pacific and the Southern Pacific* was the strong competitor, the strong line for California business?

"A. Yes, sir.

"Q. That is what you mean, is it not?

"A. Yes, sir. It was at that time the strong line.

"Q. Well, is it not to-day?

"A. No; I think the Santa Fe is equally strong.

"Q. You think it is equally strong to-day with the Union Pacific-Southern Pacific line?

"A. Yes, sir.

"Q. When you speak of the Union Pacific and Southern Pacific being competing lines, you do not mean to testify that the Southern Pacific could compete against itself, holding both ends of the line, do you?

"A. No, sir. I was speaking rather of the agents than of the roads.

"Q. So far as the Southern Pacific is concerned, is it not a question purely of division, as to whether it will get more revenue by way of New Orleans than by way of Ogden?

"A. Certainly.

"Q. That is true, is it not?

"A. Certainly.

"Q. And it was trying to work the traffic the way that afforded it the most revenue?

"A. Undoubtedly. The agent wanted to make the best showing for his agency that he could, and he made the best showing by sending it via New Orleans rather than to get it at Ogden.

"Q. He had to work for the gateway that afforded the Southern Pacific the most revenue, and no matter which way it went, if it did not go over the Atchison, it would go over the Southern Pacific; that is true, is it not?

"A. Yes, sir."

This testimony is typical. It is all of a piece. The examination of the witnesses, direct succeeded by cross, repeated again and again in the record, becomes a sort of monotonous refrain. This is the testimony of which the dissenting Judge in the Circuit Court speaks in a fugitive way as pointing to competition. It is the testimony which the Circuit Court characterized in this language:

> "The voluminous evidence of officers, agents and shippers to the effect that active competition existed between the Union Pacific and Southern Pacific roads prior to 1901 must be considered in the light of the legal and physical relations of the roads to each other and of other related facts. Whether there was competition or not, in view of

all these things, was a mixed question of law and fact most susceptible of determination by preponderance of proof as an issue of fact only. Without doubt there was active competition, but it was chiefly in co-operation with initial lines which had the routings of freight and for the benefit of such initial lines and their connections to Omaha or Kansas City, as well as for the benefit of the Union Pacific Company itself. Even, so far as it was for the benefit of the latter Company it operated necessarily for the benefit of the Southern Pacific to an extent of about eight-twentieths of the haul after the Union Pacific took it at Omaha or Kansas City. In this condition of things the opinions of any number of witnesses as to whether the two were competing lines within the meaning of the law is of little aid, and the general statement of those witnesses that the two roads had separate soliciting agents throws little if any light upon the ultimate issue."

In respect to the California business, therefore, to and from the Atlantic seaboard and the interior, the Union Pacific and Southern Pacific are connecting lines the Union Pacific is in no other relation, it could have no other. Something, now, as to these soliciting agents—not that this is an ultimate or crucial matter; it is only a phase and superficial aspect of the more radical issue.

No doubt, if two competing lines, like the Great Northern and the Northern Pacific, are consolidated, whatever view may be taken, in law or practice, of that situation, some administrative economies might be looked for—a joint soliciting agent might be in-

stalled at a point originating traffic, where formerly two soliciting agents, one for the Great Northern and one for the Northern Pacific, had been employed and paid. But precisely the same thing would follow where two connecting lines, with soliciting agencies, separately organized, had come under a common general administration. The Pennsylvania Company may have owned a line from Pittsburg to Youngtown, a point midway between Pittsburg and Buffalo. Some New York Company may have owned the line for the rest of the way from Youngtown to Buffalo. The Pennsylvania Company has its commercial agent in Buffalo; so has the New York Company; and a parallel condition would be reproduced at Pittsburg. By purchase of the physical properties, by lease, by stock interest or otherwise, the administration of the New York Company is committed to the Pennsylvania Company. A joint agent, instead of two, at Buffalo, also at Pittsburg, would be a natural sequence, an obvious administrative economy. Ogden is a point midway between San Francisco and the Missouri River, as Youngtown is a point midway between Pittsburg and Lake Erie. Suppose the Southern Pacific, like the Pennsylvania Company, was administering the continuous line between San Francisco and the River; or that the Union Pacific was the managing factor—the substitution of one joint agent for the line, in place of two agents reporting to separate administrations, would naturally follow. A joint agent, where there had been two, is an equivocal, not a determining quantity, in assigning the relation, whether connective or competitive, of the former administrations; it may point as

well to the one relation as to the other. It proves nothing of itself. We are remitted to the original question, were the two lines connecting or competing. This is the whole significance attaching to the circumstance that when the Union Pacific entered into the general administration of the Southern Pacific line, one agent, a joint agent, where there used to be two, was stationed at various centers of traffic, more or less important, like Chicago or Cincinnati or Pittsburg. If the Southern Pacific line had not extended from San Francisco to El Paso and beyond to Tidewater—if the Sunset line had never existed, or had been wiped off the map, the same thing precisely would have followed upon the Union Pacific administration; two men would not have been employed for the connecting lines in one place, where one joint agent could do the business. The argument of the case is not advanced one step, when it said that the Huntington stock purchase was followed by the establishment, in certain places, of joint agencies where separate agencies had formerly existed.

Something more, as to these joint agents. Under the general administration of the Union Pacific and Southern Pacific, the separate agencies formerly existing in the Atlantic Seaboard territory, at New York, for instance, at Boston, at Philadelphia, were retained; they have not been consolidated (p. 310). The Southern Pacific Company, on the business, say, from New York, has the long rail haul from New Orleans to California, if it had no ships of its own to New Orleans, or to Galveston, it would naturally prefer the Mallory

ships as a connection to the Union Pacific line between Omaha and Ogden, because, in preferring the one connection, not the other, the Mallory to the Union Pacific, it would be making for the longer haul—for its longer line from New Orleans in preference to its shorter line from Ogden. Its soliciting agent at New York would, therefore, work preferably for the Sunset Route and the longer haul. On the other hand, the Union Pacific agent at New York would depend on the business moving out over the trunk lines through Chicago or St. Louis to the Missouri River. Only in such event could the Union Pacific participate in the haul. But his interest would, in effect, be as well a Southern Pacific as a Union Pacific interest; for every pound of freight that went over the Union Pacific to Ogden would be taken by the Southern Pacific to California. And the joint rate on which the freight moved was a rate to which the Union Pacific could not have been a party, the price made for the movement was one which it could not have quoted without the concurrence and consent of its sole connecting line into California, the Southern Pacific Company. The Union Pacific agent was in the situation, as a factor, by the privity and consent, and as the ally, of the Southern Pacific. He is still there in New York, under a Union Pacific administration, and so too is the separate Southern Pacific agent for the Sunset Route, Mr. Spence, or his successor.

Now, it must be remembered that the primary and direct competition for the seaboard business, is among the initial trunk lines, *inter sese*, and again, between

them collectively and the Sunset Route. In the early days, just after the Sunset Route was opened, its takings from the Atlantic Seaboard territory were relatively large. But between 1895 and 1901, they declined from 79 to 39 per cent, according to the figures of complainant's witness, Mr. Blye. These percentages, as Mr. Stubbs states, cover not only California but Asiatic and British Columbia business, all transcontinental territory, including North Pacific Coast—all the so-called transcontinental business (pp. 3912-3913). It will be observed that this relative falling off in Sunset takings covers a period prior to the Huntington stock purchase; and it also appears, looking at the Sunset business not relatively, but absolutely, that between June 30, 1900 and June 30, 1907, it increased 70 per cent. The relative increase of the trunk line takings is explained by Mr. Stubbs (p. 3913): "The growth of the northwest was very rapid, much more so than California; the increase of traffic to the northwest was more rapid and relatively greater in bulk than it was to California. The completion of the Atchison, Topeka & Santa Fe road had stirred the trunk lines to greater endeavors; their activities were such that a larger share of the traffic went that way, all-rail, than formerly went that way; in fact, there was scarcely any commercial or industrial condition but what contributed to the relative—not the actual, but the relative decrease in the movement via the Sunset Route."

As Mr. Spence testifies (p. 3995):

"Q. As long as you have been here in New York, you have never known the entire New York business

to be attracted to the decks of the Morgan Line ships, have you?

"A. I regret to say I have not.

"Q. A substantial tonnage moves west over the trunk lines does it not?

"A. Yes, sir.

"Q. To California?

"A. Yes.

"Q. If that business goes to California all rail, it would leave the trunk lines where?

"A. It would leave the trunk lines at Chicago or St. Louis."

And again (p. 3995):

"Q. What is the situation in New York as between the so-called Union Pacific agent and the Southern Pacific agent in respect to transcontinental business moving from New York to California? Your function as Southern Pacific agent, I should assume, would be to work preferentially for the long haul?

"A. That is correct; that is my first duty.

"Q. What is the function of the representative of the Union Pacific-Southern Pacific systems, whom we will term for convenience, the Union Pacific agent—what is his function in this place, what is he doing?

"A. He is soliciting California traffic for the Union Pacific line to Ogden and the Southern Pacific line thence to California."

In speaking of the duties of an agent in connecting line territory—off his own line—Mr. Stubbs says (p. 306): "He must work with the connection—the connection which originates the traffic, dominates and controls the routing of it." And Mr. Spence testifies (p. 3996): "The chief duty of the Union Pacific agent in the Atlantic Seaboard territory, or for that matter any other agents in what you might call a foreign territory —that is, a territory that is not reached directly by its own line—is to promote the relations of his company with the connections. The Union Pacific agencies in the Atlantic Seaboard territory serve the purpose of maintaining harmonious relations with their connections, cultivate them, if you please; and the benefits that are derived by the Union Pacific from that cultivation are also derived by the Southern Pacific line from Ogden to California."

Mr. Spence further testifies that an agent in foreign territory will seek, "to some extent," to have his friends among the large shippers direct that shipments pass over the agent's line, "irrespective of what initial line may take it." But, as the various primary lines, the trunk lines, out of the seaboard, are in immediate touch with the shippers, and actively competing among themselves, and as the business can be taken at Chicago, or at Kansas City through St. Louis, by the Santa Fe to the exclusion of both Union Pacific and Southern Pa-

cific, it is clear that the agent in this foreign territory of the seaboard will find it of prime importance to cultivate the initial lines. And hence it is, that Mr. Spence goes on to say: "If I was representing a line in a foreign territory, I should spend most of my time in cultivating my connections" (p. 4012). And he adds: "I can have a friend on a connecting line that will give me more business than half a dozen shippers" (p. 4013).

It is quite evident, then, that the Southern Pacific is interested in the large tonnage, which does not seek the Morgan line, but goes out from the seaboard over the trunk lines to Chicago, principally, and also to St. Louis. That is a *datum*, a known and given quantity—that this large tonnage, directly tributary to the trunk lines will not be drawn to the Sunset Route. If that tonnage leaves Chicago by the Santa Fe, the Union Pacific rails between Omaha and Ogden, and the Southern Pacific rails between Odgen and California, lose the haul. The Southern Pacific wants that tonnage for its line between Ogden and California just as much as the Union Pacific wants it between Omaha and Ogden. The Southern Pacific, prior to 1901, was a concurring party to the through line and through rate, which enabled the Union Pacific to give its New York agent something to work for in the seaboard, and in working for the Union Pacific, he was working for the Southern Pacific as well. He was not simply a Union Pacific solicitor, he was a Union Pacific-Southern Pacific solicitor. And although, in other places, under the general administration of the two connecting lines, separate agencies have been

consolidated into a joint agency, the conditions in the seaboard are still the same, the Southern Pacific agent, working preferentially for the long haul, is still there, the Union Pacific agent, with his eye on the trunk line tonnage through the Middle West gateways, is still there. Those separate agencies, and the separate agencies elsewhere in the seaboard, have not been consolidated. We are not, therefore, advanced in the ascertainment of a connective or competitive relation by reference to a subsequent consolidation of commercial agencies. We go back to the fundamental and inevitable logic of the situation, that the Union Pacific and Southern Pacific, on seaboard business—and also interior business—to and from California, are connecting lines, and that if the Union Pacific were not a connecting line of the Southern Pacific, dependent upon the voluntary convention of the Southern Pacific for its privity to the joint rate and its membership in the through route, it would not participate in the business.

PACIFIC RAILROAD ACTS.

In paragraph III of the bill of complaint, Section 15 of the Act of Congress of July 2, 1864 (13 Stat., 356), is quoted as follows:

> "That the several companies authorized to construct the aforesaid roads are hereby required to operate and use said roads and telegraph for all purposes of communication, travel and transportation, *so far as the public and government are concerned*, as one *continuous line*, and in such operation and use to afford and secure *to each* equal advantages and facilities as to rates, time and

> transportation, without any discrimination of any kind in favor of the road or business of *any or either of said companies*, or adverse to the road or business *of any or either of the others.*"

The bill goes on to say, in this same paragraph, that the provision just quoted "was in substance re-enacted" by the Act of Congress of June 20, 1874 (18 Stat., 111); and the bill gives its own paraphrase of this latter statute as follows:

> "Any officer or agent of the companies refusing to operate and use the said railroad for all purposes of communication, travel and transportation, so far as the public and the government are concerned, as one continuous line, without discrimination as aforesaid, was declared to be guilty of a misdemeanor punishable by fine and imprisonment, and any party injured was authorized to sue for damages, or to procure an injunction to enforce its provisions."

The bill does not quote the statute in terms.

The bearing of this legislation on the case alleged in the bill, is not indicated beyond the mere reference to the statutes themselves. Some bearing, it must be presumed to have had in the mind of the pleader. If any bearing it had on the relation between the companies, as connective or competitive, it must go on the recognition of that relation as being one of connecting lines; it could have no sensible construction from the other point of view. If the implication of the pleader is that the Southern Pacific was compellable to interchange traffic on joint through rates with the Union

Pacific at Ogden, it runs counter to the assumption which prevails all through the *Orange Routing Case* that the Southern Pacific Company enjoyed full freedom to make or to refuse to make through rate tariffs with its connections, of which the Union Pacific at Ogden was one. But more than that, the legislation quoted in the bill was not intended by Congress to impose upon the companies connecting at Ogden the duty of agreeing upon a joint through rate on trans-continental business, or otherwise, and it does not express any such purpose.

The Southern Pacific and the Union Pacific, in the first place, are required by this legislation to "operate and use said *roads* and *telegraph* for all purposes of *communication, travel* and *transportation*, so far as the public and the government are concerned, as one continuous line." Does the expression, as used in the Pacific Railroad Acts, "one continuous line," import a traffic agreement, for a joint rate, or does it mean that the roads—physical things—shall be operated and used in travel and transportation as an unbroken mechanical line, without interruption or breach of continuity, as they have been operated and as they are being operated through Ogden to this day? Certainly the expression is a familiar one in state legislation authorizing the consolidation of continuous and connecting lines, and its implication has always been physical (*Mackintosh* v. *R. Co.*, 34 Fed., 582, 615). That the expression is physical and mechanical, is shown by the earlier and original Act of July 1, 1862 (12 Stat., 489), of which the Act of July 2, 1864, was an amendment. Section 12, dealing with the physical features of the "entire line," pro-

vides: "The track upon the *entire line* of railroad and branches shall be of *uniform width* to be determined by the President of the United States, so that, when completed, cars can be run from the Missouri River to the Pacific Coast; the *grades* and *curves* shall not exceed the maximum grades and curves of the Baltimore & Ohio Railroad; the *whole line* of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel and transportation, so far as the public and government are concerned, as one *connected continuous line.*"

Section 16 of this same original Act provides for authority to the companies "to form themselves into one consolidated company," and in Section 16, again developing the physical character and implications of the "continuous line," the Act proceeds: "Provided, that if said railroads are not *completed* so as to form a *continuous line* of railroad, *ready for use*" from the Missouri River to the Sacramento River in California by July 1st, 1876, they shall be forfeited to, "and be taken possession of by the United States."

In Section 9 of the amendatory Act of July 2, 1864, it is provided "that any company authorized by this Act to construct its road and telegraph line from the Missouri River to the initial point aforesaid may *construct* its road and telegraph *line* so as to *connect* with the Union Pacific Railroad at any point westwardly of such initial point." The term "connect," used in immediate relation and context with the term "construct," obviously has a physical implication; and it is the word

"connect" which we have just seen, in Section 12 of the Act of July 1, 1862, to be part and parcel of the expression, "connected, continuous line."

In Section 15 of the Act of July 2, 1864, quoted in the bill, "The several companies authorized to *construct* the aforesaid *roads* are hereby required to operate and use said *roads* and telegraph, for all purposes of communication, travel and transportation, so far as the public and the Government are concerned as *one continuous line.*" This language has the same physical complexion. And in Section 12 of the same Act, this term "line" and the term "connect" are used in a physical sense, the section reciting that "the last named company [Union Pacific, Eastern Division] may proceed to *make* said *road* westward [Union Pacific proper being in default on construction] until it *meets* and *connects* with the Central Pacific Railroad Company on the same *line.*"

By Section 2 of the Act of July 3, 1866 (14 Stat., 79), the Union Pacific Railroad Company was authorized, with the approval of the Secretary of the Interior, "to locate, *construct* and *continue* their *road*" from Omaha west, and without reference "to the initial point on the one hundredth meridian of the west longitude" as provided by the former legislation, "in a *continuous completed line,* until they shall *meet* and *connect* with the Central Pacific Railroad Company of California;" and the Central Pacific was likewise authorized "to locate, *construct* and *continue* their *road* eastward, in a *continuous completed line,* until they shall *meet* and *connect*

with the Union Pacific Railroad." And each company was given the right, "when the nature of the work to be done, by reason of deep cuts and tunnels, shall for the expeditious construction of the Pacific Railroad require it, to work for an extent of not to exceed three hundred miles in *advance* of their *continuous completed line.*"

By Section 2 of the Act of March 3, 1869 (15 Stat., 324), the Union Pacific, Eastern Division, was authorized to extend "*its railroad* and telegraph to a connection at the City of Denver, so as to *form with that part of its line,* herein authorized to be constructed, operated and maintained by the Denver & Pacific Railway & Telegraph Company, a *continuous line* of *railroad* and telegraph from Kansas City, by way of Denver, to Cheyenne."

In Section 1 of the Joint Resolution, approved April 10, 1869 (16 Stat., 56), it is provided that the common terminus of the Union Pacific and Central Pacific shall be at or near Ogden "and the Union Pacific Railroad Company shall build, and the Central Pacific Railroad Company pay for and own the railroad from the terminus aforesaid to Promontory Summit, at which point the *rails* shall meet and *connect* and *form one continuous line.*"

In the Act of June 20, 1874 (18 Stat., 111), referred to but not quoted in terms in the bill, the language, affecting the term "one continuous line," is as follows: "And any officer or agent of the companies authorized to *construct* the aforesaid *roads* or of any company en-

gaged in operating *either* of said *roads,* who shall refuse to operate and use the *road* or telegraph *under his control,* or which *he* is *engaged in operating,* for all purposes of communication, travel and transportation, so far as the public and the government are concerned, *as one continuous line,*" shall be penalized.

The expression, "one continuous line," imports, therefore, a physical, mechanical meeting and connecting of *rails,* and the forming thereby of, "one continuous line."

It will be noticed that the operation and use of the roads as one continuous line is made expressly to relate to the public and the Government—"so far as the public and the Government are concerned." Going, now, to the language of the Act of July 2, 1864, and June 20, 1874, in respect to "equal advantages and facilities as to rates, time and transportation," and in respect to "any discrimination of any kind," it will be observed that the several companies are required, in operating and using the roads as one continuous line, to secure these equal advantages and facilities "to each"; and without discrimination "in favor of the road or business of *any or either* of *said companies,* or adverse to the road or business of *any or either* of said *companies.*"

The purpose and meaning of this language is—the roads being operated as a physical continuity—that no discrimination in passenger or freight rates shall be made by the Central Pacific, for instance, against the Union Pacific, in respect to a movement between any

two points on the one continuous line, but that the same rate per passenger mile and the same rate per ton mile shall apply to passengers or freight passing from a Central Pacific point through Ogden to a Union Pacific point, or conversely, as shall be applied by the Central Pacific to freight and passengers between points on its own part of the one continuous line. Uniformity of rate per ton per mile, or per passenger per mile, as well as uniformity of gauge in the physical track, between points on the one continuous line, was the thing that Congress had in mind. Through rates on transcontinental traffic between points off the continuous line in the Atlantic Seaboard or in the interior, upon the one hand, and in California, upon the other, were not in mind and were not intended.

This will be re-enforced by the legislation *in pari materia* of the Act of July 27, 1866 (14 Stat., 292), providing in Section 18 for the physical connection of the Atlantic & Pacific Railroad with the Southern Pacific Railroad of California, at a point near the California boundary, with a view to a railroad line to San Francisco. That point of connection, as matter of history, turned out to be The Needles, on the Colorado River, at the eastern boundary line of the State of California.

Section 18 is as follows:

> "*And be it further enacted*, That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic & Pacific Railroad, formed under this Act, at such point, near the boundary line of the State of Cali-

fornia, as they shall deem most suitable for a railroad line to San Francisco; *and shall have a uniform gauge and rate of freight or fare with said road;* and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

Again, *in pari materia*, we have the Act of March 3, 1871 (16 Stat., 573), incorporating the Texas Pacific Railroad Company from Marshall, Texas, via El Paso, through New Mexico and Arizona, to the Colorado River, thence to San Diego, California. Section 15 provides:

"That all railroads constructed, or that may be hereafter constructed, to *intersect* said Texas Pacific Railroad, shall have a right to *connect* with that *line; that no discrimination as regards charges for freight or passengers, or in any other matter* shall be made by said Texas Pacific Railroad Company against any of said connecting roads, but that *the same charges per mile as to passengers, and per ton per mile as to freight*, passing *from* the said *Texas Pacific Railroad* over any of *said connecting roads;* or passing *from* any of said *connecting roads* over any part of said *Texas Pacific Railroad*,—shall be made by said company as they make for freight and passengers *over their own roads.*

"Provided, also, That said *connecting road shall reciprocate* said *right of connection* and *equality of charges* with said *Texas Pacific Railroad:*

> "And provided further, That the rates charged for carrying passengers and freight, *per mile*, shall not exceed the prices which may be fixed by Congress for carrying passengers and freight on the Union Pacific *and* Central Pacific Railroads."

We think it quite clear, therefore, that there is nothing in the Congressional legislation referred to in the bill of complaint, to affect the question of *through joint rate* tariffs on transcontinental business between seaboard and interior points on the one hand and California points on the other, going through Ogden; or to derogate from the assumption of the *Orange Routing Case, supra,* that such tariffs are wholly a matter of agreement with the Southern Pacific, to make with the Union Pacific or to refuse to make, as it elects.

More than this, and apart from a voluntary agreement of the connecting lines, there is no machinery in these Pacific Railroad Acts for the ascertainment of through joint freight tariffs, and beyond that, for the apportionment of the through joint rate between the two connecting lines at Ogden. If the Southern Pacific, for example, refuses to make joint through rates with the Union Pacific, it is not competent to a Court to make the contract and prescribe the terms, nor, having decreed what the through joint rate shall be, to go on and rule how it shall be apportioned between the parties. This is not a judicial function. A court may enforce the obligations of a contract by applying to it the rules of law presently in force and ready to hand. The Court determines, judicially, what the law is and what the rights of parties are, with reference to transactions

already had; but a determination and establishment of what the rule shall be in future cases—like the establishment of a rate—is essentially legislative (*Prentis* vs. *Atlantic Coast Line*, 211 U. S., p. 226).

> "A court of chancery is not, any more than is a court of law, clothed with legislative power. It may enforce, in its own appropriate way, the specific performance of an existing legal obligation arising out of contract, law or usage, but it cannot create the obligation" (*Atchison Case*, 110 U. S., p. 682).

In the *Express Cases*, 117 U. S., pp. 28, 29, the decree of the lower court prescribed the rates and terms on which the railroad companies should carry certain express companies with power reserved to the Court, on the application of either party, to change the measure of compensation.

> "In this way, as it seems to us," said the Supreme Court of the United States, "the Court has made an arrangement for the business intercourse of these companies, such as in its opinion they ought to have made for themselves, and that, as we said in *Atchison Co.* vs. *Denver Co.*, 110 U. S., p. 667, followed at this term in *Pullman Co.* vs. *Missouri R. Co.*, 115 U. S., 587, could not be done. *The regulation of matters of this kind is legislative in its character, not judicial.*"

And if the matter were judicial—if it were not legislative; and if a Court, at the instance of the Union Pacific, could order the Southern Pacific to make a through joint tariff with the Union Pacific, and could apportion the divisions of the through rate between the connecting lines,—a through rate, on a parity, for

instance, with such through rate as the Southern Pacific, unconstrained by statute or court, might make with the Denver & Rio Grande, it would still remain that the amount of the Denver & Rio Grande through rate would rest in the voluntary agreement and concurrence of the Southern Pacific. And, in any event, the Southern Pacific, under this hypothetical construction of the statutes and of judicial function—could not be required to accept less than a reasonable through rate, amounting to adequate compensation for the service. The Union Pacific, of its own vigor, or under any statute, or through any judicial decree, could not dictate the price which the Southern Pacific should make on the transportation via the New Orleans and El Paso gateways. It would fail in the first element of a competitor, the ability to meet a price.

It was the absence of legislation and of machinery for the establishment of through routes and through joint tariffs, that led to the Hepburn Amendment of the Interstate Commerce Act, in which legislative authority was provided for the establishment of through routes upon joint rates, and in which the quasi-legislative machinery of the Interstate Commerce Commission was furnished for the prescription of the joint rate, as a rule for the future, and for its apportionment between the connecting lines.

The Interstate Commerce Act from this point of view recalls the Pacific Railroad Act. It has provided from the beginning:

> "Every common carrier subject to the provisions of this Act shall, according to their respective

> powers, afford all reasonable, proper and *equal* facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those *connecting therewith*, and *shall not discriminate in their rates and charges* between such *connecting lines*, but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business" (Sec. 3).

It has never been supposed, under language such as this, that a common carrier was compellable to make joint through tariffs with connecting lines, or was shorn of its option to select one connecting line for its through arrangements, to the exclusion of another.

> "A common carrier," said Mr. Justice FIELD (*Oregon Short Line* vs. *Northern Pacific*, 51 Fed., pp. 474-5), in speaking of this section, "is left free to enter into arrangements for the use of its tracks or terminal facilities with one *or* more connecting lines, without subjecting itself to the charge of giving undue or unreasonable preferences or advantages to such lines, or of unlawfully discriminating against other carriers. In making arrangements for such use by other companies, a common carrier will be governed by considerations of what is best for its own interests. The Act does not purport to divest the railway carrier of its exclusive right to control its own affairs, except in the specific particulars indicated."

In this same case, Section 5 of the Act of July 2, 1864 (13 Stat., 365), was called to the attention of

the Court. It made it the duty of the Northern Pacific "to permit any other railroad which shall be authorized to be built by the United States, or by the Legislature of any Territory or State in which the same may be situated, to form *running connections* with it, on fair and equitable terms."

> "We are of opinion," said Mr. Justice FIELD p. 476), "that a running connection of one road with another, within the meaning of the defendant's charter, only includes such arrangements as to the time of arrival and departure of trains, and as to stations, platforms and other facilities, as will enable companies desiring to connect to do so without detriment or serious inconvenience."

In *Chicago & N. W. Ry. Co.* vs. *Osborne,* 52 Fed., p. 914, it was said by Mr. Justice BREWER:

> "Where two companies owning connecting lines of road unite in a joint through tariff, they form for the connected roads practically a new and independent line. Neither company is bound to adjust its own local tariff to suit the other, nor *compellable* to make a *joint tariff* with it. *It may insist upon charging its local rates for all transportation over its line.*"

And again:

> "A joint tariff does not bind road to road in the sense that the two are used or operated by either corporation. There is neither unity of ownership nor unity of operation but only a singleness of charge and a continuity of transportation over connecting roads. Neither is there any mandate to connecting companies to surrender any control

over their own roads, *or to unite in a joint tariff*. 'Reasonable, proper and equal facilities for the interchange of traffic' are commanded by the third section, but with the proviso: 'This shall not be construed as requiring any such common carrier to give the use of its track or terminal facilities to another carrier engaged in like business.' No power existed at common law, and none is given by the Act to court or commission to compel connecting companies to contract with each other, to abandon full control of their separate roads, or to unite in a joint tariff [citing cases]. The whole matter is left to the voluntary action of the company; and, in forming by agreement any joint tariff, the basis of division and the proportion of moneys each shall take is also a matter left to their determination" (p. 915). Mr. Justice BREWER adds that, "at the time of the passage of this Act, joint through tariffs were well known, *as well as the fact that they were generally less than the sum of the local tariffs*, and not distributed between the several companies making them according to the mere matter of mileage."

In the case of *Little Rock & M. R. Co.* vs. *St. Louis S. W. Ry. Co.*, 63 Fed., p. 778, it was said by the Circuit Court of Appeals:

> "It has been held that neither by the common law, nor by the Interstate Commerce Law, have the National courts been vested with jurisdiction to compel interstate carriers to enter into arrangements or agreements with each other for the through billing of freight, or for joint through rates. Agreements of this nature, it is said, under existing laws, depend upon the voluntary action

of the parties, and cannot be enforced by judicial proceedings without additional legislation."

And again, speaking of the contrary doctrine:

"Another necessary result of the doctrine contended for is, that it deprives railway carriers, in a great measure, of the management and control of their own property, by destroying their right to determine for themselves what contracts and traffic arrangements with connecting carriers are desirable and what are undesirable. There ought to be a clear authority found in the Statute for depriving a carrier of this important right, before the authority is exercised, for, when questions of that nature have to be solved, a great variety of complex considerations will present themselves, some of which can neither be foreseen nor stated" (pp. 779-780).

Again:

"It is the settled construction of the Act, as we have before remarked, that it does not make it obligatory upon connecting carriers to enter into traffic arrangements for through billing and rating either as to passenger or freight traffic. This conclusion has been reached by all the tribunals who have had occasion to consider the subject, and it is based on the fact that, in enacting the Commerce Act, Congress did not see fit to adopt that provision of the English Railway and Canal Traffic Act, passed in 1873, which expressly empowered the English commissioners to compel connecting carriers to put in force arrangements for through billing and through rating when they deemed it to the interest of the public that such arrangements should be made" (p. 781).

Further:

> "The Interstate Commerce Act does not, it seems, at present, make it obligatory on carriers to make arrangements of either sort [for use of tracks and terminals, or for through rating], and does not give the Commission power to compel such arrangements, but leaves connecting carriers, as at common law, to determine for themselves when such arrangements are desirable, and when undesirable" (p. 781).

And finally:

> "We are also forced to conclude that if the public interest requires that interstate carriers shall be compelled to put in force arrangements for through billing and rating, and for the establishment of joint through lines, the Statute should be made more explicit, and that the Commission should be empowered to prescribe the terms of such arrangements upon a comprehensive view of the circumstances of each particular case" (pp. 781-2).

We think it clear, therefore, to a demonstration—if that expression may be applied to an argument not mathematical—that the Southern Pacific Company was a connecting line of the Union Pacific on seaboard and interior business, that it was the only connecting line the Union Pacific had in this business, that the Union Pacific could not handle a pound of freight for the California points except by using the Southern Pacific line, and that the privity of the Union Pacific, with or apart from the Denver & Rio Grande, to the joint tariff, its participation in the through line, the opening or closing to it of the Ogden gateway to or from Cali-

fornia—was a matter resting in and requiring the voluntary agreement of the Southern Pacific Company. If we may say so without leaving the amenities of debate, it is little short of preposterous to say that, on this business, they are competing, not connecting lines. Indeed, apart from questions of corporate power and legal duty, and viewing the situation purely as one *in pais*, the Union Pacific needed the Southern Pacific not simply for the business westbound into California, but again, and conversely, on business eastbound from California to the Missouri River and east, and upon that eastbound business the Southern Pacific at Ogden had as well the Denver & Rio Grande as the Union Pacific for its connection, and by the mere exercise of its influence as the initial, the home line in California, it could deflect that business from the Union Pacific to the Denver & Rio Grande, without disturbing for an instant the existence of joint through rates with both connections, even as it actually and historically did deflect the business from the Denver & Rio Grande to the Union Pacific. As Mr. Stubbs puts it in his testimony, speaking of the Southern Pacific officers: "They would have diverted traffic from the Union Pacific. The Rio Grande had very powerful connections at Pueblo and Denver, such as the Missouri Pacific, the Chicago, Rock Island & Pacific, the C. B. & Q., the Santa Fe, all of whom, so far as Colorado common points were concerned [which would represent one-half of the service of the Union Pacific to Ogden] were eager for this business, and of course would have co-operated in any endeavor to get the larger portion of the business that way. The very large territory, locally, which I

have described, productive territory, consuming territory, of California, of course would have been closed to the Union Pacific road, except upon what they could have done by solicitation against the active endeavors on the part of the Southern Pacific or the Central Pacific to send it the other way. I don't know whether that makes it very clear to you, but in my mind I think that statement itself would be sufficient to illustrate to any traffic man that they would have sewed the Union Pacific up very quickly."

"Q. Now, let me see if I get your mind. Do you mean that these conditions would result, even though the Southern Pacific did not take out the through route with the Union Pacific, did not close the gateway, did not disturb the *status quo* at all so far as through arrangements with the Union Pacific were concerned;—was the Southern Pacific sufficiently influential to deflect the business without extinguishing the through arrangements with the Union Pacific?

"A. No doubt about it. Perhaps I had better tell you a story" (pp. 3906-7).

The complainant having joined with the defendant in expressing a wish to have the story told, Mr. Stubbs proceeded:

"After I came to Chicago and was put in charge of the Union Pacific system as well as that of the Southern Pacific, I was in New York and had occasion to call on Mr. Gould, President of the Missouri Pacific, who at that time had acquired the Rio Grande. I had

very pleasant relations with him. When I sent in my card, he invited me to come into his office at once, and when I got in there I found the traffic officers of the Rio Grande with him. They were discussing how the relations of Mr. Gould to the Rio Grande could be made—lawfully, of course—useful to the Missouri Pacific, and suggestions were made that they could arbitrarily divert the traffic to the Missouri Pacific. They went on discussing it in my hearing as though I were not present. I said, 'Mr. Gould, pardon me, I would not do it that way if I were in your place.' He said, 'How would you do it?' I said, 'I would not say anything about it publicly, I would not make any public demonstration at all, I would just tell these boys that you would like to have that business go as much as possible over the Missouri Pacific line.' He looked at me and said, 'By God, that's what you've been doing to me by Ogden, isn't it? '"—referring to the situation at Ogden as between the Denver & Rio Grande and the Union Pacific, both parties to the through joint tariff, in view of the preferred connections between the Southern Pacific and Union Pacific since the stock purchase (pp. 3907-8).

Mr. Stubbs goes on:

"Now, that is all that was done in that way. It only illustrates the value of the sympathy and the co-operation of a connecting line. It can hardly be expressed in language, hardly be made manifest to a layman, one who is not acquainted with the practical operation and close relationship between shippers and carriers. But

possibly it would be a sufficient answer to your question to say, that I think there would be no doubt to any traffic officer in the room or anywhere, as there is no doubt in my own mind, that under conditions which have been described, if the Union Pacific had undertaken to divert traffic for *San Francisco* and San Francisco Bay, which is the *only traffic* they could have used the Portland Route for,—under these peculiarly unfavorable conditions, undoubtedly the Southern Pacific could have made it so costly to the Union Pacific and in a lawful way, too, that they would have been sorry that they had any such line as a steamship line from Portland to San Francisco. Now, I not only think so, but I think the Union Pacific officers thought so—knew so —and that is the reason they didn't try it" (p. 3908).

Counsel for complainant did not approve of the witness dipping into the mind of somebody else. He objected pleasantly: "I suppose it is hardly proper for you to give your guesses as to what was in the mind of somebody else. I do not like to interrupt you because your testimony is very interesting.

WITNESS: Well, that is all right.

MR. SEVERANCE: It is hardly testimony.

WITNESS: I don't want to say anything improper, you know that.

MR. SEVERANCE: You ought not to.

WITNESS: It seems to me, if you please, that it is germane, because with my experience there in San

Francisco for this long period, and never having had occasion to resent or object to the use of that line, certainly I have the right to say that these gentlemen did not consider that.

MR. SEVERANCE: You rather objected to your argument in the Canadian Pacific matter [the arbitration of the Canadian Pacific differential] being regarded as testimony in this case, you said you were an advocate; so I was merely suggesting you should not be an advocate here, but you should confine yourself to the facts.

WITNESS: My objection didn't go with you, did it?

MR. SEVERANCE: No, it didn't.

MR. DUNNE: In fact, I think the record ought to show that Brother Severance—I won't say that he was unprofessional—because he never is, but he was singularly lacking in amenity to pull the argument of opposing counsel upon him as testimony in a law suit, and I will dismiss it with that observation.

WITNESS: Severance is a good fellow.

MR. DUNNE: But I will ask you this question in view of Brother Severance's objection: If it needed any clairvoyance to read the mind of the Union Pacific officers on the situation you have been describing?

WITNESS: *"Not a bit"* (pp. 3908-9).

And Mr. G. W. Luce, former General Agent of the Union Pacific at San Francisco, and since General

Freight Agent of the Southern Pacific, gives this testimony:

"Q. And since 1900 and 1901, how has the business moved—the Union Pacific business?

"A. Always through Ogden by the Southern Pacific Company.

"Q. And the eastbound business, how did that move?

"A. The Southern Pacific through Ogden and the Union Pacific.

"Q. Some of that business moved, did it not, also D. & R. G., and about what percentage did the business divide in 1900 and 1901?

"A. I should say 70 and 30—70 per cent. to the Union Pacific and about 30 per cent. to the Denver & Rio Grande.

"Q. Since 1901 how has the business divided at Ogden between the Union Pacific and D. & R. G.?

"A. You mean recently?

"Q. Yes.

"A. *Ninety per cent.* to the Union Pacific and about *ten per cent.* to the Denver & Rio Grande" (p. 4543).

THE ALLEGED PORTLAND ROUTE.

It was the force of these considerations that drove the complainant to the suggestion of the so-called Portland Route. The point was this: It may be that the

Union Pacific and Southern Pacific are connecting lines through Ogden on this California business; but the Union Pacific strikes off at Granger, 130 miles east of Ogden to the northwest proceeding along the rails of the Short Line up through Wyoming and Idaho to Huntington in Eastern Oregon, then from Huntington, along the rails of the Oregon Railroad & Navigation Company, up to the northern Oregon line at Umatilla, on the bank of the Columbia River, and then west along the river bank to Portland; and from Portland, on the Willamette River, there is a waterway through the Columbia River northwesterly along the Oregon boundary to the Pacific Ocean; and a steamer can take freight from Portland over the Columbia River to its mouth at the Pacific Ocean, and then through the Pacific Ocean, along the Oregon Coast and the California Coast to San Francisco; and hence there is a conceivable route for the Union Pacific from Omaha by way of Granger and Huntington and Portland to the Pacific Ocean, and by the ocean to San Francisco, that does not take in the Southern Pacific. This is the so-called Portland Route, the transcontinental "paper" route; and the suggestion would seem to be that the Southern Pacific stock was purchased to suppress the *competition* existing between the Union Pacific Portland Route to San Francisco, and the Southern Pacific line to San Francisco. It could only have been the exigency of the case that prompted this suggestion.

A couple of steamers did ply between Portland and San Francisco; they plied there long before the Union Pacific was conceived; they have plied there since 1849

(p. 4488, R. B. Miller). They were a local enterprise. They carried grain, potatoes and box-shooks from Portland to San Francisco, with a merchandise freight in return. The grain originated in the territory now served by the rails of the Oregon Railroad & Navigation Company, the potatoes on the Williamette River, south of Portland, and the box-shooks locally at Portland (p. 4487). The merchandise freight from San Francisco had a local zone of distribution, through Portland, to points in Eastern Oregon, Washington and Idaho, and points on the Williamette, south, of course, from Portland (p. 4487). The time from port to port was about 60 hours, the sailings every 5 days (p. 4488). In 1888, and until the receivership and reorganization, the Union Pacific was operating the Short Line and the Navigation Company to Portland as part of its line from Omaha (p. 3905). Mr. Stubbs was asked:

"Q. If it be assumed that the Union Pacific did acquire practical control of the Short Line and the O. R. & N. as early as 1889, is it a fact that in 1889 and prior thereto the O. R. & N. had been operating these through steamers between San Francisco and Portland?

"A. Of course, I had no connection with those properties at the time, but I know that the O. R. & N. did operate steamers between San Francisco and Portland at that time, and has in fact—either the O. R. & N. or its predecessor—all the time since I know anything about this business until the present organization was made" (3905-6).

Again:

"Q. Could the Union Pacific, practically speaking, make such a through rate [on California business] by the use of the rail line to Portland and the steamships through the ocean to San Francisco—I speak now of the O. R. & N. steamship lines from Portland to San Francisco?

"A. Why, if they would disregard every consideration of profit or self interest, of course, they could make the rate—I suppose that is what you mean by saying, could they practically do it.

"Q. Yes, sir.

"A. I simply wanted to make it so my statement would be well protected; *why it was an impracticable route.* They could not do it in this sense, that the Union Pacific's own separate and individual interests would restrain it from doing anything of the kind would render the doing of anything of that kind a costly thing; it would cost more than it would make, in other words.

"Q. It is one thing to make through rates on paper, and another thing to make practical and operative through rates?

"A. Yes. And that route *for business on and east of the Missouri River*, so-called route, rail to Portland and steamer from Portland to San Francisco, *has never been anything but a paper route*" (pp. 3901-2).

Again:

"Q. Will you please describe the Union Pacific line, or so-called line, this paper route that you spoke of, by way of Portland and the ocean to San Francisco?

"A. The Union Pacific line from Omaha to Granger, the Oregon Short Line, which is owned by the Union Pacific, and then the O. R. & N. Railway from Huntington to Portland, and what was, at the time of this so-called merger, the O. R. & N. steamers running between Portland and San Francisco. The service, of course, over the all-rail line was daily. The service between San Francisco and Portland was, I think, a steamer every five days. The distance from Omaha, the eastern terminus of the Union Pacific, is greater to Portland over the line that I have described than the distance from Omaha to San Francisco over the Union Pacific and Central Pacific which I have described. The freight undertaken to be moved via Portland to San Francisco by whatever route it chooses, when it gets to Portland has yet to travel more than one-third of the distance from the starting point to San Francisco via the Union Pacific. It takes more time, under ordinary conditions, that is, equal conditions by both rail lines, to get into Portland than it would to get into San Francisco. It would have to await at Portland the arrival of a steamer, because the steamer goes only every five days, against a daily service all-rail into San Francisco; subject to the additional transfer, subject to the perils of the sea, which it would not be by the all-rail route; the disabilities of that line as compared with the all-rail being probably represented by five

days additional service or additional time employed. I think that is rather less than more than the average additional cost. Additional handling, which, while it may be said is entirely at a cost of the carrier, is a thing that the shippers take into account because they would rather have their goods in good condition than to have a claim. And these disabilities are common and well known, and are such that no shipper would use that line without some compensation, and there is no way to compensate, that I know anything about, except in the rate, and of course the competitors of the Union Pacific for San Francisco business would not permit it to make a lower rate by that route than they make. *In other words, it is practically a no-thoroughfare; has been generally recognized so*" (p. 3905).

On cross-examination Mr. Stubbs was asked (p. 3936):

"Q. You stated to-day, in answer to Mr. Dunne, when he was interrogating you with reference to the Portland Route, so-called, that that was an impracticable route; when Judge Lovett asked you that question in Chicago, you said, 'No, I wouldn't say the route was impracticable, but I would say that it would be inefficient as compared with the all-rail route'—why have you *changed* your opinion?

"A. Well, you can make my answer to-day that way. Probably I am a little more exact in the one case than in the other. I think probably they come to the same end. When you consider the line in its relationship to capacity of doing the business or getting

the business, it is an inefficient line, and I don't know but I would be quite willing to substitute the word 'impracticable' for 'inefficient' in both cases. It is a matter of opinion, of course. I think it is an impracticable route; so do you."

Mr. Stubbs is further asked (p. 3906):

"Q. You have stated here, Mr. Stubbs, that you have been in the railroad business in California from 1870—I think that is the year you gave. Have you ever, in your long railroad experience, known that route by Portland and the ocean to San Francisco to be operated as a through route and worked as a through route?

"A. My answer is no. Perhaps I had better explain. Of course, it is pretty well known that I have been practically at the head of the Freight Department for the Central Pacific interests since certainly 1872, and perhaps more intimately associated and connected with the industrial development of California than any other railroad man in the country. *In all that time I have never known any business to move, or to be worked through the influence or endeavors of the Union Pacific, even of the Union Pacific's own representatives in San Francisco, via the Portland gateway to or from points on or east of the Missouri River.*"

"Of course," he continues, "I was alert in watching the interests of the Central Pacific as a connection of the Union Pacific, but it was so manifest to me that the Union Pacific interests lay in *connection* with those of the Central Pacific, that I do not think I ever appre-

hended any attempt upon their part to use the other lines for San Francisco business. There *may* have been *sporadic cases* when business moved that way; there may have been *an occasional jag of freight* gone that way for some reason or other, but never had I occasion in all this time to enter a protest or to inquire, or to say anything about that line to a Union Pacific officer. I was quite certain in my mind that it would not be a profitable venture upon the part of the Union Pacific, and I never had any reason to believe that the Union Pacific officers did not hold the same view.

"Q. Did the Southern Pacific have any rail connection at Ogden beside the Union Pacific?

"A. As I have explained, the Rio Grande Western road connected with the Central Pacific, in 1882, I think it was, at Ogden.

"Q. Whereas the Union Pacific had the rails of the Central Pacific, and the rails of the Central Pacific alone, upon which to move into California, the Southern Pacific had two connections at Ogden—the Union Pacific and the D. & R. G., as far back as 1883; is that correct?

"A. That is true.

"Q. What effect, if any, would that situation have upon the attempted use by the Union Pacific of the alleged Portland Route?—if I were to assume hypothetically that the Union Pacific should really and substantially make the attempt to use that route, what

effect would the situation at Ogden have upon those conditions?

"A. In the past?

"Q. Yes.

"A. Why very naturally the officers of the Central Pacific Railroad and the Southern Pacific Company would have resented it, would rightfully have assumed that the Union Pacific was undertaking to divert traffic from the Central Pacific, and in every way that they knew how, if they could not prevail upon the Union Pacific to stop it, they would have endeavored to counter upon the Union Pacific. They would have diverted traffic from the Union Pacific. The Rio Grande had very powerful connections at Pueblo and Denver, such as the Missouri Pacific, the Chicago, Rock Island & Pacific, the C. B. & Q., the Santa Fe, all of whom, so far as Colorado common points were concerned [which would represent one-half of the service of the Union Pacific to Ogden] were eager for this business, and of course would have co-operated in any endeavor to get the larger portion of the business that way. The very large territory, locally, which I have described, productive territory, consuming territory, of California, of course would have been closed to the Union Pacific road, except upon what they could have done by solicitation against the active endeavors on the part of the Southern Pacific or the Central Pacific to send it the other way. I don't know whether that makes it very clear to you, but in my own mind I think that statement itself would be sufficient to illustrate to any traffic man

that they would have sewed the Union Pacific up very quickly.

"Q. Now, let me see, if I get your mind. Do you mean that these conditions would result, even though the Southern Pacific did not take out the through route with the Union Pacific, did not close the gateway, did not disturb the *status quo* at all so far as through arrangements with the Union Pacific was concerned;—was the Southern Pacific sufficiently influential to deflect the business without extinguishing the through arrangement with the Union Pacific?

"A. No doubt about it. Perhaps I had better tell you a story." Mr. Stubbs then proceeds to tell the story of his interview with Mr. Gould in respect to the deflection by the Southern Pacific of business from the Denver & Rio Grande to the Union Pacific at Ogden. We have already quoted this testimony. It will not be necessary to repeat the additional testimony given by Mr. Stubbs along this line, which we have already quoted, and in which he explains the impracticability of any attempt by the Union Pacific to force business by the Portland route into California or out of California, as against the direct connecting line with the Southern Pacific at Ogden (pp. 3906-7).

As Mr. Stubbs pertinently pointed out, the Portland steamers would not get beyond San Francisco Bay; they would not make their way inland; they were not like the "air ship" that Senator Kearns spoke of (pp. 2568-9), in the days of the San Pedro Company's contest over the Meadow Valley Canyon; California

interior points would at once bring the Southern Pacific rails into the problem.

Indeed, the mere question of wharf delivery at San Francisco Bay would be a factor. Mr. Spence was asked (p. 3990):

"Q. Have you heard of the so-called Portland Route, by way of Portland and the ocean to San Francisco?

"A. I have heard of it recently." [He is referring to the pendency of this case.]

"Q. By the way, how long have you been in this Sunset business?

"A. Nearly 25 years.

"Q. Has that route, so far as you know, ever been operated for business from the Atlantic Seaboard to San Francisco or California points?

"A. It has been a part of my duty to keep track of the lines engaged in the same business that we are engaged in, and I never heard of that line being engaged in the traffic between Atlantic Seaboard territory and California until recently—I never heard of it until recently.

"Q. I think the table of distances involved in the route, the mileages, have been given, and I will not take up your time with that; but would the question of wharf delivery—I don't know that that point has been touched upon here—would the question of wharf

delivery at San Francisco be a factor in connection with the practicable or impracticable character of that route?

"A. It would be a very important factor in my judgment.

"Q. In what way?

"A. Our experience is, that taking freight to a port reached by steamship lines, at equal rates with an all-rail line, we are never able to get a substantial share of the traffic, because of the convenient facilities for delivery that the all-rail lines offer. They have their side tracks, spurs, delivery depots, usually have more than one in a town and convenient to the consignee or shipper.

"Q. With respect to the traffic from the seaboard to California, or in the opposite direction, is there some traffic that would not stand transportation by way of the Portland Route?

"A. There is considerable traffic of that kind.

"Q. Of what character?

"A. For example, harnessed pianos from New York; the cheap pianos are harnessed right in the freight car. They cannot move by water at all, or part water and rail route. Take the immense cracker business of the National Biscuit Company; it is put up in such frail form of package that they ship exclusively by all-rail routes, to enable them to load in the original car and send through to destination. Take earthenware and

crockery; that is shipped out of here at Trenton, N. J. They pack that in the cars in straw; it is not in packages. It cannot be handled by the water and rail route. These are fair examples."

Further (p. 3992):

"Q. I will ask you if, in all the 25 years of your railroad experience—and I understand that your experience, railroad and steamship, has been in connection with this Sunset line—during all of that time did you ever know of any business to move to California by that Portland Route?

"A. I never did.

"Q. Or from California?

"A. I never did."

Touching his testimony as to wharf delivery, and its difficulties, at equal rates with an all-rail line and its facilities, Mr. Spence was cross-examined as follows (p. 3034):

"Q. Traffic moving eastbound to New York City, the Sunset Route carries a large amount, doesn't it?

"A. Yes.

"Q. At equality of rates with the rail lines, doesn't it?

"A. Yes.

"Q. How do you make that fact consistent with your statement?

"A. By the lighterage plant whereby we make deliveries around New York Harbor, the same as the trunk lines.

"Q. Do you go along the industries around New York?

"A. Why, the industries in New York must be all deliverable by lighter.

"Q. They can all be delivered by lighters, can they?

"A. Yes.

"Q. How about the business to San Francisco?

"A. To San Francisco?

"Q. Couldn't the Portland line put in a lighterage plant there?

"A. At San Francisco?

"Q. Yes, or are they differently located there?

"A. The conditions are different there. The rail delivery in San Francisco would be an actual track delivery. There is nobody capable of making track delivery in New York except one line. All the all-rail freight that is secured against the Sunset at an equality of rates is deliverable by lighter."

The incommensurability of this Portland Route with the Sunset line is further developed by Mr. Stubbs. He had been explaining that the route by the Pacific Ocean to San Francisco was no more a route through the

Puget Sound ports than through Portland. He was asked:

"Q. Now, take the suggestion you have made, of a comparison with the Sunset Route. That route was also part water and part rail. Will you explain in your own way the operation of the Sunset Route, as the taker of a substantial tonnage between the seaboard and California, in contrast with the non-participation of the lines part water and part rail through the Pacific Ocean gateway?

"A. Why the Sunset Route part water and part rail was comparatively successful and why the others via Puget Sound did not meet it?

"Q. Yes. I would like to have you go on in your own way and explain that.

"A. It seems to me it is obvious. In the first place, the Sunset Route mixed water and rail line, as has already been explained, is a solid line, a line that so far as traffic and operating conditions are concerned, as I have explained, is under one management and control. In the second place, the steamship service is the initial service, and the initial point is the City of New York, which, with the communities within lighterage limits, furnishes by far the most productive port, from the point of supply, in the country, if not in the world. The ships moving from New York to New Orleans would draw from this immensely productive market or these productive markets not only traffic for San Francisco and San Francisco Bay points, but a very large

tonnage for New Orleans, Louisiana, Texas, even Oklahoma, Mississippi, Southern California as well as immediate points between Southern California and San Francisco and all of the interior of California, that I have described. They all contribute to the tonnage that would safely, economically and profitably to the carrier be moved by the steamships from New York to New Orleans. The result was that always three ships a week, according to my recollection, and sometimes four, were despatched, and there have been seasons when there has been a ship despatched every day, I believe. The ships, as I have explained, were loaded just as a car is loaded for distribution of local freight. The freight that must come out first is the last put in; the freight for California was loaded in last and came out first, and so the opportunity was given for the prompt and expeditious movement over the line. Now it seems to me that that would be obvious to anybody as a distinct and complete answer to any suggestion that because the mixed water and rail line via New Orleans or Galveston was measurably successful, that a mixed water and rail line via Puget Sound ports, with the steamship service on the delivering end of the line, would be equally successful. Now, there is another feature to this; I think I gave it already. The Southern Pacific Company, the Central Pacific Company, is the home line, well understood. It is like the Northern Pacific at St. Paul. Anybody knows that—you know that; anybody that goes into St. Paul——

"Q. Now, don't try to represent Brother Severance's mind or you will get into trouble. Go ahead.

"A. It is not only recognized as the home line, not only the popular line, notwithstanding seasons of apparent great unpopularity; but the people have a pride in it. Moreover, the merchants of San Francisco are dependent upon the Southern Pacific, whose lines extend into the interior, opening up the consuming territory which supplies their trade, for the facilities of transportation; they are more or less dependent upon the Southern Pacific as they are not upon any other carrier, not even the Santa Fe. In fact, they have always called upon the Southern Pacific for new movement, new construction, new facilities, anything and everything that promised to improve the mercantile or commercial conditions, the opening up of new territory for them. In other words the Southern Pacific is California's baby, you know in a certain sense, and they will nurse it when they won't nurse any other line, and they will spank it when they would not spank anybody else. Now, while that is a sentimental reason it is a very powerful reason why the Southern Pacific Company controls traffic for its line, for a line understood to be Southern Pacific line, all the way through, against any other influence that can be exercised. I am not sure whether that answers your question or not" (pp. 3910-3912).

The impracticability of this so-called Portland route, the fact that, beyond "an occasional mis-routed car" (pp. 2989-2990), it was "no thoroughfare," is brought out by witness after witness. The evidence to the point is overwhelming. There is no substantial contradiction. For the convenient reference of the Court, we

have set forth the testimony of some of these witnesses, not all of them, in the Appendix to this brief, p. 1.

CANADIAN PACIFIC, GREAT NORTHERN, AND NORTHERN PACIFIC, IN RELATION TO CALIFORNIA BUSINESS, BY WAY OF THE PUGET SOUND PORTS AND THE PACIFIC OCEAN.

The Canadian Pacific, through Puget Sound and the Pacific Ocean, as also the Great Northern and the Northern Pacific, through Seattle and Tacoma respectively and the Pacific Ocean, had tried and failed on California business. At a differential rate, as Mr. Spence shows, the traffic of the Canadian Pacific through Vancouver was not substantial as compared with the total traffic (p. 3991). And when the differential was abolished, the Canadian Pacific practically withdrew from the business (H. W. Adams, p. 2972).

It was in respect to the Canadian Pacific that Mr. Stubbs was reminded by opposing counsel of his "differential" argument. As the advocate for the American lines, Mr. Stubbs "made the strongest showing I knew how to make. * * * I was not testifying—I was simply arguing the case of the American lines, and presenting their case in its strongest possible light as I saw it" (pp. 2018, 2019).

Now, Mr. Stubbs, as the advocate for the American lines, in arguing against the allowance of a differential to the Canadian-Pacific that would make its rate lower than the standard rate of the standard American line to California, like the Union Pacific-Southern Pacific line by way of Ogden, took the clear ground that the

Canadian Pacific, with its roundabout and broken service, part water and part rail, through Puget Sound to San Francisco, or, for similar reasons, the Great Northern, and the Northern Pacific, and again the Union Pacific by way of Portland, was not a natural and normal means of transportation, and could not compete for the business normally with the standard line. And if the Canadian Pacific, not because of its adequacy, but because of its inadequacy, was entitled to make a lower rate, why not the Great Northern, the Northern Pacific, or the Union Pacific through Portland? But the lowering of rates, after this fashion, on the northern lines, would be met by the standard line, the rate situation would be in chaos, and confessedly the Canadian Pacific could not do the business on a parity of rates with the standard line. The Great Northern, and the Union Pacific by way of Portland, were not asking a differential; the Northern Pacific, granted a differential in 1888, had suffered it to lapse into disuse. The Canadian Pacific, confronted on this business with its own incapacity and difficulties—at least as bad if not worse than in the case of the other northern lines—was not entitled to a differential which they did not enjoy; why should the Canadian Pacific have a differential as against American lines, not standard lines, but, like the Northern line, having no access to California, except at San Francisco, and then by roundabout and mixed service, part rail and part water. The very disabilities which Mr. Stubbs argued against the Canadian route, he was imputing to the Portland route of the Union Pacific, and he consistently stood upon that imputation in the case now before this Court. In order

that there may be no misunderstanding of the position of Mr. Stubbs at the Canadian arbitration, and for the convenient reference of this Court, we have made a review of his differential argument in the Appendix to this brief at p. 20.

In fine, Mr. Stubbs says of this Portland route (p. 2024):

"I will simply say, that to me it is obviously an impracticable route for the Union Pacific; obviously the Union Pacific would have been very foolish to have undertaken to use that route; obviously the Union Pacific officials knew that just as well as I did, and as a matter of fact they never did undertake to use it to any appreciable extent. I think possibly it will be found on the record that there may have been sporadic shipments that way, but for any organized endeavor on the part of the Union Pacific road to use that route I never have known of any such thing as long as I have been connected with the Southern Pacific."

Mr. Spence also testifies (p 3991):

"Q. Did you ever know of any business in a substantial sense going to California territory by way of the Pacific Ocean route, through the Puget Sound gateway?

"A. I never did."

Mr. Stubbs, again (p. 3909), shows that "the movement to or from the Missouri River or points east" has never in any substantial sense been over the Northern lines via Puget Sound; "they have never taken

enough of the business that way to attract any attention or call for any protest or objection." And if the Northern route, rail and ocean, has never been a practicable route for the Canadian Pacific, the Great Northern, and the Northern Pacific no one of which had any other way of making its own route to San Francisco or California points, for how much stronger a reason was not the Portland route an impracticable route by way of the Union Pacific and the boats, when the Union Pacific was the connecting line of the Southern Pacific, with all the implications, so fully brought out by the witnesses, of that connecting relation at Ogden? Is it thinkable, that the Union Pacific paid $40,000,000 in February, 1901, to restrain and destroy the *competition* between the Portland route and the connecting line by way of Ogden?

The conclusion of the Circuit Court as to this suppositious route for transcontinental business by way of the Portland detour and the Pacific Ocean, is set forth in its findings as follows:

> "It [Union Pacific] had a connection at Granger with its subsidiary lines, the Oregon Short Line and the Oregon Railroad and Navigation Line, extending to Portland, and there with a line of steamboats irregularly and infrequently running between that port and San Francisco. But this detour through Portland and over the sea was long, unreliable and unsatisfactory, and afforded no opportunity for fair and remunerative competition with the Southern Pacific for San Francisco trade. It was about 1,700 miles in length as against 800 miles in direct line from Ogden to San

Francisco. In fact, prior to 1901, it had never been employed in any substantial way as an outlet for the Union Pacific's westbound trade into San Francisco. It is inconceivable, therefore, that the Huntington stock was purchased to prevent, or had the effect of preventing in any substantial way, free competition with so devious and impracticable a route."

Again the Court finds:

"In view of the fact that the Southern Pacific owned and operated the road from Ogden to San Francisco with which alone, except for the circuitous and impracticable route via Portland and the Sea to San Francisco, the Union Pacific could have connected, and over which alone it could have carried its traffic to San Francisco, we are unable to understand how the Union Pacific could have been an independent competitor with the Southern Pacific for business over that road into San Francisco. While the Union Pacific was entirely dependent upon the Southern Pacific for its connection westward, the Southern Pacific was not at all dependent upon the Union Pacific for its connection eastward. The Denver & Rio Grande Company and its allied lines under one control had a through route extending from Ogden through Denver, Kansas City, St. Louis to Chicago and other inferior points, and thence by many available connections to New York and the Seaboard. This was obviously a most attractive and powerful rival of the Union Pacific Company, and a constant menace to its success. The latter was in no position to coerce any action by the Southern Pacific. Its hands were tied. But it is argued, it could retaliate by using its influence

to induce initial carriers or shippers to route transcontinental freight by way of Portland and the Sea to San Francisco. This being such a long and unreliable route, little success could have been reasonably expected in such retaliation. If the Rio Grande should have been favored by the Southern Pacific as its Eastern connection, the Union Pacific, in the language of the witnesses, would have been practically bottled up at Ogden. With the advantages possessed by the Southern Pacific as an initial carrier to deflect all eastbound traffic to another line at Ogden, and with the right to exact on all east or westbound traffic, local rates instead of a fair and just proportion of an established through rate, the Southern Pacific would easily have put a quick and decisive ending to any hostile rivalry or competition if such had been hazarded by the Union Pacific. This absolute dependence by the latter upon the Southern Pacific for a distance of eight hundred miles of its only through route, to say nothing of its dependence upon the voluntary action of its eastern connections already pointed out, in our opinion rendered any equal or profitable competition between them impossible. No real rivalry in the nature of claims could have subsisted as long as the success of one was dependent upon the consent or favor of the other. Instead of the situation being competitive, the two roads really acted together and co-operated between themselves and with their connections in securing as much of the transcontinental traffic, each for the other, according to their respective facilities, as they could get, and participated in the total revenue on a basis of comparative service rendered. Their relations were like those of a limited partnership rather than those of hostile competitorship."

And again:

> "Our conclusion is that all the facts of this case, considered in their natural, *reasonable* and practical aspect, and given their appropriate relative signification, do not make the Union Pacific a substantial competitor for transcontinental business with the Southern Pacific in or prior to the year 1901."

DENVER AND SALT LAKE BUSINESS.

On the main substantial business, then, between the two companies, the transcontinental business, they are connecting lines. The complainant looked round for something here, there, or elsewhere, to eke out a case, and caught at some incidental business, something at Denver and Salt Lake, something at Portland or through Portland, including the few miles of river boat business south of Portland—as if these are the things that make the substance and fix the character of the issue, as if these things so much as rose into consciousness in that hour of destiny when the vital and overshadowing importance to the Union Pacific of preferred relations with its connecting line was sought to be safeguarded by the stock purchase.

In its relation to these Utah and Colorado points, the Union Pacific was a line, beginning at Omaha and Kansas City, on the Missouri River, and ending at Ogden; the Southern Pacific, a line of steamers from New York to New Orleans (Galveston came in August, 1902, p. 3989), with a piece of railroad from New Orleans to Fort Worth, Texas. The contracts forbidden by the Anti-Trust Act, as stated and reiterated in the

Addyston Case, 175 U. S., p. 229, are those "which *directly* and *substantially*, and not merely *indirectly—remotely*, *incidentally* and *collaterally*, regulate to a greater or less degree commerce among the States."

And in the *Standard Oil* and *Tobacco cases*, the more comprehensive generalization and criterion has been evolved, historically and analytically, of "the rule of reason, guided by the established law and by the plain duty to enforce the prohibitions of the act, and thus the public policy which its restrictions were obviously enacted to subserve" (*Standard Oil Case, ubi supra*, p. 515). Passing, for the moment, the question whether the Denver and Salt Lake business had a relation substantial in character, not incidental, to the stock purchase, whether it imparted to that transaction the purpose, quality, and effect of an unreasonable restraint of interstate commerce,—it may be asked, in respect to the Utah and Colorado business, whether, indeed, at the time of the stock purchase, the Union Pacific and the Southern Pacific were competing lines in a real and direct sense, not a remote one. Fixing our eyes on the map, we see the Union Pacific, an east and west line between the Missouri River points, Omaha and Kansas City, on the east, and Denver and Salt Lake on the west. Moving, now, on a north and south line, we go through the States of Kansas, Oklahoma and Texas, to the Gulf of Mexico, and there we find the Southern Pacific branch line, leaving the main Sunset line from New Orleans at Houston, and going north as far as Fort Worth, Texas. It is somewhat of an effort to conceive this north and south

line in Texas as a competing line in a direct sense of the east and west line between Omaha and Salt Lake, for instance, or between Kansas City and Denver. Certainly, Fort Worth in Texas, Denver in Colorado, Salt Lake in Utah, Omaha in Nebraska, or Kansas City at the Kansas-Missouri boundary, do not respond to the notion of a common terminus. Still looking at the map, we find the other terminus of the Southern Pacific line, New York, removed by half a continent from the proximate eastern termini of the Union Pacific. If it be within the Anti-Trust Act to buy stock in a line directly competing, and if the Southern Pacific line betwen Houston and the Pacific Coast had never existed, it would follow, on the theory of complainant, that because the Southern Pacific owned the piece of road to Fort Worth connecting with the New York ships at New Orleans, it could not lawfully acquire an interest in the line from Ogden to San Francisco, no matter how obvious and vital the connecting relation through Ogden might be. The Southern Pacific is a primary line at New York City directly related to the seaboard business. It takes that business to Forth Worth only, not directly to the Colorado or Utah point, and it can engage in service to such point only indirectly and by joint arrangement with some north or south line like the Colorado & Southern, and by farther arrangement with still another line, east and west, like the Colorado Midland and the Denver & Rio Grande, or the Union Pacific itself—unless the business is to move on the local to Fort Worth plus the locals north and west. These joint arrangements, as Mr. Justice BREWER pointed out

in the *Osborne Case*, 52 Fed., page 912, are not the original and direct result of some one carrier's power or activity, but require the consent and concurrence of another carrier or carriers, which may or may not, at will, be accorded. The Union Pacific, on the Utah and Colorado business, has no primary or direct relation to the traffic at all. Its proximate terminus is separated by a tier of States from the point of origin. It is only by indirection, rather complicated, but susceptible of clear statement, that it gets into relation with the business. That is to say, the rail lines out of New York to Chicago and St. Louis, and the connecting lines from those gateways to the Missouri River, or the water lines from New York to Atlantic ports, like Norfolk, Newport News, Savannah, with the connecting rail lines through the intervening States, say to St. Louis, with the connecting lines, again, from St. Louis to Kansas City; or again, the water lines from New York to the Gulf, like the Mallory line and the Southern Pacific itself, with the connecting rail lines northward to Kansas City or Denver; —all these various lines, by voluntary contract *inter sese*, to which the Union Pacific might or might not be admitted, may form a new line from the seaboard to the Colorado or Utah point, which is not the Union Pacific line and which the Union Pacific can join, as a constituent, only by the grace of a stranger and strangers. If this is direct competition—between the Southern Pacific line and the Union Pacific line on Utah and Colorado business—between two lines, separated by tiers of States, and without a common terminus—Mr. Munroe's testimony becomes of interest. He produces

"Transcontinental Freight Bureau Westbound Tariff, No. 1-J," containing eight pages of the mere list of concurring carriers, representing 473 constituent railroads (p. 4047). And at page 4003 of the Record will be found, as part of Mr. Spence's testimony, maps or diagrams of the principal available routes between the seaboard and California, and the seaboard and Utah and Colorado—lines having through arrangements. He is asked (p. 4003):

"Q. Do I understand you that the through routing of one of these lines is confined simply to the line that physically follows it, some particular line, or do I understand you that through routes multiply into through routes? How is that?

"A. Every line operating between New York and Buffalo can handle traffic over every line operating west of Chicago, so that the actual routes represented by this map would multiply into thousands.

"Q. Do these Atlantic port routes, like the Gulf routes, have rail connections to the distributive territory in question?

"A. They do; the Old Dominion Line through Virginia ports, and the Mallory line and the Morgan line to the Gulf ports have rail connections with which they are engaged in the California business.

"Q. Does this multiplication of routes apply as well to the map of Utah and Colorado routes as to California routes?

"A. It does.

"Q. You have not undertaken to express that multiplication of routes on account of the almost infinite detail that it would involve.

"A. It would be an interminable job."

The Lackawanna Railroad may operate a line from New York to Buffalo, and as such become a member of the through line constituted with it by the Michigan Central from Buffalo to Chicago, by the Burlington from Chicago to Denver, by the Denver & Rio Grande, from Denver to Ogden and by the Southern Pacific from Ogden to San Francisco. The Mallory Steamship line from New York to New Orleans may select the Texas & Pacific at New Orleans as its connecting line in the through route, as far as El Paso—it is not limited to the Texas & Pacific, it might have selected another Texas line. From El Paso, the transit is continued on a line which is not the Texas & Pacific, to the destination at San Francisco. Is the Lackawanna Railroad, a line from New York to Buffalo, the direct competitor of the Texas & Pacific, one line, but not the only line, from New Orleans to El Paso? This is a far cry. As Mr. Munroe testifies (p. 4063):

"Q. As a matter of fact, do not all the railroads in the United States make connections with practically all other railroads in the United States for the purpose of forming through routes for the transportation of freight and passengers?

"A. They do."

There ought to be some way out of this confusion, some principle of distinction, avoiding the somewhat startling reduction, that a water line from New York to New Orleans or Galveston, with a piece of railroad up to Fort Worth, Texas, is a direct competitor of a rail line whose point of beginning is no nearer the originating point of the traffic than Kansas City to New York, and whose western termini are no nearer the Texas stopping place of its assumed "direct competitor," than Denver, Colorado, or Salt Lake, Utah, to Fort Worth, Texas.

In the *Louisville & Nashville Case,* 161 U. S., p. 682, it appeared that the Louisville & Nashville road was a line from Louisville, Kentucky, by way of Nashville to Memphis, Tennessee. The Chesapeake & Ohio road was a line beginning at the same point, Louisville, and going to the same point, Memphis, by way of Cecilia Junction, and Paducah (pp. 682, 683). They were held to be competing lines. The Court refers to an Ohio case, 37 Ohio St., 590, in which two railroad lines, one from Cleveland, the other from Toledo—these places being both Lake Erie ports—converged at Cincinnati. The Ohio Court held, as the Supreme Court expresses it, "That in view of the existence of a large commerce from the Southern States by way of Cincinnati, *to ports upon Lake Erie,* as well as *from* such points *southerly,* by railroad lines *converging at Cincinnati,* these were substantially parallel and competing roads." It does not appear, by any "indirection" of geographical relation, that Kansas City and Omaha are ports on the Atlantic, any more than New York is

a port or point on the Missouri River; nor is there any way of superimposing Fort Worth on Denver or Salt Lake or Omaha or Kansas City or any other Union Pacific point, in order to make a point of convergence. The Southern Pacific and the Santa Fe converge at San Francisco; they compete directly for the business at its source. They serve the business of a common point, a "local" point on *both* lines. In the *Louisville & Nashville Case*, the Supreme Court, speaking of the Louisville line from Louisville by way of Nashville to Memphis, and of the Chesapeake line from Louisville by way of Paducah to Memphis, said:

> "That the lines proposed to be consolidated are parallel and competing is evident from an inspection of the maps, since *both* connect the two important cities, Louisville and Memphis, which constitute *their termini*, and are natural competitors for the traffic from the southwestern to the northeastern States by way of Cincinnati, as well as that in the opposite direction."

The Southern Pacific line from New York to Fort Worth, and the Union Pacific line from Kansas City or Omaha to Denver or Salt Lake, do not connect any two cities, and have no point of convergence, whether of origin or destination. At no point on the map are they related directly. As the Supreme Court said of the north and south lines through the State of Connecticut, in the *Louisville & Nashville Case* (p. 699),

> "these are strictly parallel lines, but in only a *limited* sense competing, since they are *between different termini*, and each is required by the trade of its own section of the State."

Two independent lines cannot be said to be competing in the direct sense, as distinguished from some indirect and "limited" sense, unless they are related by common termini. Unless this distinction be taken, we shall be thrown back upon the deduction, that the line between New York and Buffalo, is a competitor, not in some indirect and limited sense, but directly, of the line between New Orleans and El Paso—the Lackawanna, a direct competitor of the Texas & Pacific. And if these two lines, just named, are not direct competitors, upon what theory of avoidance is it to be asserted that the line from New York to Fort Worth, Texas, through the Gulf, is the direct competitor of a line from Omaha to Denver?

In the case of *Burke* v. *Railway Company*, (10 Ohio Dec. [reprint], 529) the court said:—

> "In the case now before us the Big Four and the Bee Line are in no sense parallel—indeed it would be nearer to the fact to say that they run at right angles to each other, since the general direction of the Bee Line is from the northeast to the southwest, while that of the Big Four is from the southeast to the northwest. Are they competing lines? It is said a reference to the map of the two lines clearly shows that they are. The westerly connection of the 'Bee Line' makes southwesterly from Indianapolis to Terre Haute and St. Louis, while that of the Big Four makes northwesterly to Lafayette and Kankakee. The points reached are widely divergent, and the idea of competition would hardly occur to the popular mind from an inspection of the map. Yet it is not to be doubted that there is some competition

> for such business destined to and from the seaboard and eastern states, and also for business at points west of Indianapolis, resulting more, perhaps, from crossing and intersecting other lines that serve as feeders than that the two roads in question tend in the same direction or to the same commercial centers, for we think such is not the case; and while there is incidental competition between these roads, as there is between every one of those roads and many others that might be named, we are disposed to hold that in no proper legal or commercial sense can they be said to be in their general features and from a geographical standpoint, competing lines."

An incidental and remote effect upon interstate commerce, to use the terms of the *Addyston Case*—of all the cases, from the *Trans-Missouri Case* down—is not the thing that the statute is concerned with.

A situation which by no straining can be impressed, either as to purpose or effect, into the category of unreasonable restraint, within the criterion of the *Standard Oil* and *Tobacco cases*, is out of range of the Anti-Trust Act.

If the Union Pacific influence in the Southern Pacific Board of Directors should withdraw the Southern Pacific from the business to Utah and Colorado, originating in the seaboard, a thing it has never done or contemplated, the effect upon that business, and upon the strife for it, would be incidental, remote, inappreciable. Every water line out of the seaboard, to South Atlantic ports, from Boston, from New York, from Philadelphia, from Baltimore, to Norfolk, Newport News, Savannah,

Jacksonville—and to the Gulf ports, New Orleans, Galveston—the Mallory line, the Clyde line, the Ocean Steamship line, the Merchants & Miners Transportation Company, the Old Dominion Steamship Company,—would still be competing for the business at its source, and among themselves, and with every rail line to the west;—with the Boston & Albany, the Boston & Maine, the New York, New Haven & Hartford, the Grand Trunk, the New York, Ontario & Western, the West Shore, the New York Central, the Erie, the Lackawanna, the Lehigh Valley, the Central of New Jersey, the Pennsylvania, the Baltimore & Ohio, the Chesapeake & Ohio, the Norfolk & Western:—the disappearance of the Southern Pacific would not stir a ripple. And for this, is the statute to be so construed as to disable the Union Pacific—or, if the Southern Pacific had acted as the purchaser, to disable the Southern Pacific—from acquiring stock in its connecting line from Ogden to San Francisco, or from Ogden to Omaha; and for this, is the direct and substantial relation of the Union Pacific and Southern Pacific to be disregarded?

Of the business to Colorado and Utah, from the territory between the Missouri River and the seaboard, only 22 per cent originated in the Atlantic Seaboard at the time of the stock purchase (p. 2997). Of that business 57 per cent moved all rail, 7 per cent by the Atlantic port routes; and through the Gulf ports 36 per cent, or less than 8 per cent of the total Colorado and Utah business, from the Missouri River and east (p. 3997).

These percentages are for the Colorado business; those for Utah are not accessible (p. 3997). But the tonnage and earnings of the Morgan line for the fiscal years 1898 and 1900 are available. For the year ending June 30, 1898, the westbound Utah tonnage was only 1665 tons, with a revenue for that year of $25,123.70. For the year ending June 30, 1900, the westbound Utah tonnage was 1532 tons, with a revenue, inclusive, as also in the figures for 1898, of the rail haul to Fort Worth, Texas, of only $24,853.48. And to Colorado, for the year ending June 30, 1900, the westbound revenue was $46,733.24, with a tonnage of 4525 tons; and for the year ending June 30, 1900, the westbound revenue, including always the rail haul to Fort Worth, Texas, was $166,255.26 with a tonnage of 14,673 tons. Or, for Utah and Colorado combined, taking the year 1900, a tonnage of only 16,000 tons and a revenue of less than $200,000—negligible, on a view of the tonnage and revenue of the Union Pacific or Southern Pacific. After 1906, there was a falling off in the business of the Gulf routes. In 1908, the all-rail lines, on Colorado business, took 41 per cent; the Atlantic port routes, 43 per cent; the Gulf routes, 16 per cent; on Utah business, the all-rail lines, 45 per cent; the Atlantic port routes, 30 per cent; the Gulf routes, 25 per cent. The Atlantic port routes had advanced from 7 per cent in 1900 to 43 per cent in 1908, on Colorado business, as to which the comparative percentages are available; while the Gulf ports had shrunk from 36 per cent to 16 per cent. The Atlantic port routes served the business to Utah in 12 or 13 days, against 16 or 17 days through the Gulf. The steamer took 6 days to go to Galveston; the steamer

time to Norfolk was 20 hours; there had been a "material improvement in the service of the Atlantic port routes (pp. 4024, 4025). The conditions were inherent; not imputable to any relations between the Union Pacific and the Southern Pacific; "there has been more than a corresponding decrease in the business of the Mallory line to Colorado and Utah"; "there has not been anything singular or peculiar about the Morgan line as distinguished from the Mallory line in that aspect of the case" (p. 4002); the Mallory line tonnage, using such figures as were available, in 1902, was 7812 tons to Colorado and 4884 tons to Utah; in 1908, 2412 tons to Colorado, and 1374 tons to Utah—an absolutely independent line (p. 4021). For the fiscal year ending June 30, 1898, and for the fiscal year ending June 30, 1900—before the falling off—the Southern Pacific revenue on the business to Colorado was only 03.88 and 01.56 respectively, or 3 and a fraction per cent and 1 and a fraction per cent respectively of the company's revenue —not of the company's general revenue, but of its total revenue derivable from the westbound *seaboard* business (pp. 4027-8). For the fiscal year ending June 30, 1898, and for the fiscal year ending June 30, 1900, again, the Southern Pacific revenue on the business to Utah was only 00.57 and 00.84 respectively, or 84 hundredths of 1 per cent and 57 hundredths of 1 per cent of so much only of the general revenue of the company as was attributable to the westbound seaboard business (pp. 4027-8, 4609).

If the two companies had been direct competitors for such business as this, if the effect of the non-

participation of the Southern Pacific therein could have been anything but remote and inappreciable, the business itself bore no substantial relation to the main transaction in issue here. But the possibility of the withdrawal of the Southern Pacific through Union Pacific influence, in purpose or in result, was remote to a degree. The Southern Pacific ships between the seaboard and the Gulf, engaged in this small business as incidental to the main takings. Their westbound business for the fiscal year ending June 30, 1898, to local points, in distinction from points in Utah and Colorado served by the Union Pacific—to Mississippi, Louisiana, Central America, Texas, Arkansas, Oklahoma, Mexico, New Mexico, Arizona, local Missouri River territory—was 37.29 per cent of their westbound seaboard tonnage; and the California takings were 58.38 per cent (pp. 4027, 4609); for the fiscal year ending June 30, 1900, their westbound tonnage to these local territories was 38.01 per cent of the westbound seaboard tonnage, and the California takings were 56.23 per cent (pp. 4028, 4609).

The first through route via the Gulf was in connection with the Union Pacific via Denver (p. 4042); that is the route to-day (p. 4000). Was the purchase of the Southern Pacific stock, was the relation between the Union Pacific and Southern Pacific as connecting lines through Ogden, merely incidental to this Utah and Colorado business? Is that business the substance of things here, denoting and expressing the character and *ratio* of the transaction? Mr. Kahn was asked the question:

"Q. There is also some evidence that the Morgan line of steamships from New York to New Orleans, in connection with the rail lines, carried some business to Utah points and some business to Colorado points, and that the Union Pacific was also engaged in some business to Colorado points and to Utah points: was the existence of any business by either company in respect to Colorado and Utah points ever considered, discussed, or even mentioned in this stock transaction?

"A. *That was of no influence whatever in our minds. It was never considered, discussed, or even mentioned*" (p. 4714).

PORTLAND AND WILLAMETTE VALLEY BUSINESS.

Portland was a common point of the Union Pacific and Southern Pacific—the only point, except Ogden, where the rails met. There were a few points on the Willamette River south of Portland—say, fifty or sixty miles south—between which and Portland the Oregon Railroad and Navigation Company operated two or three small river craft. These were also common points in the sense that they were served by the Southern Pacific rails. The business to and from Portland and these few river points was insignificant. It has no substantial relation to the case at bar. We have worked this matter out in detail, almost painful detail, and it reads in the result like a study in infinitesimals. The whole thing is set out, with full explanations, in the Appendix (p. 30). An incidental matter, the closing of the so-called Roseville gateway, and the opening of the

Portland gateway to Willamette Valley business—the application of the through rate, that is to say, by way of Portland,—to the manifest benefit of all concerned, is also fully explained in the Appendix (pp. 34, 40).

ASIATIC BUSINESS.

Some local business, wheat and flour principally, moved over the rails of the Oregon Railroad and Navigation Company to Portland, and thence by ship connection to the Orient. Some small return business was picked up in the Orient by the ships, moving overland through Portland to points in the United States by way of the Union Pacific. The Oriental business was practically done through San Francisco by way of the Union Pacific-Southern Pacific connecting line through Ogden. An explanation of this Asiatic business, its unimportant bearing on the issues, is given in the Appendix (p. 50).

EASTERN OREGON AND WASHINGTON, IDAHO AND MONTANA.

This business is so incidental and remote, that it does not appear to have been discovered by the complainant until long after this case was begun—until June 24th, 1909, when the complaint was briefly amended to state that the Southern Pacific Company was competing with the Oregon Railroad and Navigation Company "for a *large* (?) amount of traffic between San Francisco and points in Montana, Idaho and other states." This matter is dealt with in detail in the Appendix (p. 55), where some wool business, as between the Short Line and the Southern Pacific is also glanced at.

LOCAL BUSINESS BETWEEN SAN FRANCISCO AND PORTLAND.

This is also part of the incidental business. Portland, in this connection, will include the few river points to the South. The Appendix goes into the matter with particularity (p. 58).

SUMMING UP AS TO INCIDENTAL MATTERS.

The Appendix brings out the foregoing matters in detail, as distinguished from the transcontinental question, at a length out of proportion to their relative significance. But the difficulty was inherent in the subject matter for it takes as long,—sometimes longer—to tell the circumstances with any clearness, of business involving six, seven or eight hundred one-thousandths of one per cent as of business involving twenty per cent of tonnage or revenue. These incidental details have been recapitulated (pp. 3970-3972, 4599). It will be observed that subdivision E of the recapitulation relates to freight traffic, principally lumber, to Utah common points, Colorado common points, and points east thereof (pp. 3958, 3959), over the D. & R. G. in connection with the Southern Pacific, and over the Union Pacific. But subdivision G deals with the traffic in both directions between Portland and the Missouri River and points east, over the D. & R. G. in connection with the Southern Pacific (pp. 3962-3). The inclusion in the eastbound movement from Portland, over the Southern Pacific and D. & R. G., under subdivision E, of points east of Colorado common points, on reference to subdivision G which takes in the movement

in both directions, by the same connecting lines, between Portland and the Missouri River and points east thereof, would indicate a duplication of eastbound traffic from Portland, to the extent of traffic going east of Colorado common points. The recapitulation should be, therefore, somewhat abated.

On the other hand, business to and from these few points that were served by the river boats below Portland, and the east, whether by the Southern Pacific, over the Sunset Route (pp. 4586-7), or in connection with the Rio Grande (pp. 4893, 4895)—the points served by the river boats, and the local points on the Southern Pacific, not served by the boats, being segregated; and again, the business to and from these points over the Union Pacific through Granger,—does not appear in the recapitulation; but the percentages are so minute as not to make any material change. For the Union Pacific the revenue would be about five hundredths of one per cent of the operating revenue; for the Southern Pacific, Sunset and Rio Grande routes, about seventy-five thousandths of one per cent. Computing in these factors, and making allowance for the abatement above mentioned, the entire business covered by these incidental matters, represented three and six-tenths per cent of the operating revenue of the Union Pacific, at the time of the stock purchase, and the business over against it, of the Southern Pacific represented nine hundred and sixty-nine one-thousandths of one per cent of its operating revenue. This should be reduced by thirty-two thousandths of one per cent, the amount assigned in Subdivision A of the

recapitulation to *outbound* Oriental tonnage by the Sunset route through San Francisco, which was not really competitive business—leaving the net result of nine hundred and thirty-seven one-thousandths of one per cent.

When Mr. Kahn was on the stand, he was asked:

"Q. In the purchase of the Southern Pacific stock, under the circumstances that you have described, was the circumstance that the Southern Pacific was engaged in some local business—I use 'local' in respect to the Pacific Coast and more particularly to the northwest—some local business to Oregon points or neighboring points in Washington, Idaho and Montana—was the circumstance that the Southern Pacific might have been engaged in some local business of that character ever considered or discussed in the transaction of that stock purchase?

"A. That was so negligible an influence that I did not even know of it.

"Q. Was such a thing ever mentioned in connection with the stock purchase?

"A. That thing was never mentioned, as far as my knowledge as a member of the executive committee went, of the relations between the Southern Pacific and the Union Pacific. *It was almost exclusively the element—in fact, I can say exclusively the element—of the connection to the Coast which entered our minds;* and the existence of the Sunset Route not only was no inducement to us to buy the Southern Pacific, but it was

by us considered an obstacle and a deterring feature, because we did not care for the Sunset Route, we would have been glad to be relieved from it. If a way could have been found to secure the Central Pacific alone, we all would have preferred it at that time. As a local feature the competition was considered so negligible that, so far as my knowledge goes, it was not even considered at any of the executive committee meetings at which the subject was brought up.

"Q. It appears—and I might just as well mention this in connection with Oregon—that there was some Asiatic or Oriental business through the port of Portland, the Southern Pacific engaging in Oriental business through the port of San Francisco. Was that subject matter ever considered, discussed or mentioned?

"A. It was never considered, discussed or mentioned.

"Q. There is also some evidence that the Morgan line of steamships from New York to New Orleans, in connection with the rail lines, carried some business to Utah points and some business to Colorado points, and that the Union Pacific was also engaged in some business to Colorado points and to Utah points. Was the existence of any business by either company in respect to Colorado and Utah points ever considered, discussed or even mentioned in this stock transaction?

"A. That was of no influence whatever in our minds, It was never considered, discussed or even mentioned" (pp. 4713-14.)

And finally:

"Q. Was there any intent or purpose in any of these transactions to monopolize commerce or to restrain or prevent competition between carriers?

"A. None whatsoever."

The language of this Court in the *Cincinnati Packet Case* is to the point:

> *"It is manifest that interference with such commerce is insignificant ana incidental, and not the dominant purpose of the contract, if actually it was thought of at all"* (200 U. S., p. 184).
>
> "Certainly"—the finding of the Circuit Court is —"the desire to appropriate the trifling business done by the Southern Pacific Company on these minor lines, or to suppress a competition in traffic which was in the aggregate of such small proportions, could not have been the inspiration of the vast outlay involved in the purchase of the Huntington stock. Neither was the suppression of competition in this infinitesimally small proportion of the business of both companies a substantial or natural consequence of that important transaction. It did not amount to a direct and substantial restraint of either interstate or international commerce. It was at best only contingently, incidentally and infinitesimally affected by it. This is not sufficient to bring it within the condemnation of the Anti-Trust law."

In the case of *Whitwell* vs. *Continental Tobacco Co.*, 125 Fed., p. 458, it was held by the Circuit Court of

Appeals for the Eighth Circuit, in speaking of a transaction under the first section of the Anti-Trust Act:

> "If its necessary effect is to *stifle* or to *directly* and *substantially* restrict free competition, it is a contract, combination or conspiracy in restraint of trade, and it falls under the ban of the law. If, on the other hand, it *promotes, or but incidentally or indirectly restricts competition, while its main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination or conspiracy within the true interpretation of this Act, and it is not subject to its denunciation.*"

Again (pp. 462, 463):

> "The Supreme Court has declared that the true construction of the first section is, that no contract, combination or conspiracy is denounced by it *unless its necessary effect is to directly and substantially restrict competition in commerce among the States. By a parity of reasoning, the correct interpretation of the second section must be that no attempt to monopolize a part of commerce among the States is made illegal or punishable by the provisions of that section, unless the necessary effect of that attempt is to directly and substantially restrict commerce among the States. * * * But an attempt to monopolize a part of interstate commerce which promotes, or but indirectly or incidentally restricts competition therein, while its main purpose and chief effect are to increase the trade and foster the business of those who make it, was not intended to be made, and was not made, illegal by the second section of the Act under consideration, because such attempts are indispensable to the ex-*

istence of any competition in commerce among the States."

IMPROVEMENT OF THE PROPERTIES, DEVELOPMENT OF THE COMMERCE SERVED, AND SAVING IN COST OF TRANSPORTATION TO THE PUBLIC, AS THE RESULT OF THE RELATIONS BETWEEN THE CONNECTING LINES CONSEQUENT UPON THE STOCK PURCHASE.

It is made clear in the *Standard Oil Case, ubi supra*, p. 515, that contracts or acts of individuals or corporations are not within the proscription of the Federal Statute, where they have "been entered into or performed with the legitimate purpose of reasonably forwarding personal interests and developing trade."

The Union Pacific ownership of stock in the Southern Pacific, the Union Pacific influence in the Southern Pacific directorate, has not restricted the free course of trade in any direct, substantial, reasonable view; its main purpose and chief effect were, and have always been, to foster the trade and to increase the business of those two connecting lines. The development, betterment, standardization and extension of the two companies, the improvement and economies of their administration, the expansion of their traffic, the resulting appreciation in the value of their stocks to par and above, the declaration and payment of dividends to their stockholders, the reduction to the public in the price of transportation—these things, accomplished *pari passu* in the two companies, are set forth in the admirable and comprehensive testimony of Mr. Kruttschnitt. The limits of this brief, will not permit us to do justice

to that testimony, to its scope, and to its amplitude of sustaining detail. In the eight years ending June 30, 1909, for betterments, additions, equipment and new construction, there was expended on the Union Pacific the sum of $121,508,424.48; and this was independent of the joint purchase by the Union Pacific and Southern Pacific of equipment for the special needs of the fruit traffic, in the sum of $10,671,858.70. The eight and a half years, ending June 30, 1901, may be farther analyzed; for the five and a half years ending June 30, 1898, prior to the reorganization, the amount expended under the same heads was $983,678.30; for the three succeeding years, ending June 30, 1901, the amount expended was $32,474,150.23. For the eight and a half years ending June 30, 1901, for betterments, additions, equipment and new construction, there was expended on the Southern Pacific the sum of $57,722,432.41; for the eight years ending June 30, 1909, there was expended under the same heads, $241,944,414.20 (pp. 4100-4101, 4103-4). For the eight and a half years, therefore, ending June 30, 1901, the total expenditures, under these heads, by both lines, were $91,230,260.94; for the eight years succeeding June 30, 1901, the expenditures by both companies were $374,124,697.40.

Between 1901 and 1909, the average increase in cost of labor for these companies—covering 29,500 employees of the Union Pacific, something over 50,000 employees of the Southern Pacific—has been, for trainmen, agents and operators, 20 per cent on the Union Pacific, and 25 per cent on the Southern Pacific; and for

all classes of labor on both roads about 17 per cent (pp. 4089-4091).

The increase in the price of materials used in railroad operations is shown, between 1897 and 1908, in amounts per pound, per ton, per gallon, per barrel, per thousand feet, ranging from 10 per cent to 117 per cent (p. 4091). Since 1900, the purchasing power of commodities and labor has increased 42 per cent; while the power of that commodity which the railroad has to sell, transportation, has fallen about 30 per cent;—commodities and labor yielding more dollars, transportation less dollars, commodities and wages having risen very rapidly, and transportation prices having remained stationary, or possibly declined (pp. 4091-4093). These statements, and other statements by Mr. Kruttschnitt, are accompanied by graphic charts.

Taking the period, 1901-1909, the relative prices of labor, of commodities, of labor and material together, and the relative purchasing price of a dollar, are itemized; also for the Union Pacific System, the average revenue per ton mile, what the revenue per ton mile should be to offset depreciation in the exchange value of transportation, the saving to the public per ton mile, the average revenue per passenger mile, what the revenue per passenger mile should be to offset depreciation in exchange value of transportation, the saving to the public per passenger mile, the total saving to the public, are set forth item by item (p. 4096). The same itemization is set forth for the Southern Pacific Company (p. 4096); and the slight change there in the ac-

tual rate of transportation is to be viewed in the light of Mr. Kruttschnitt's explanation. "Between the years 1901 and 1909," he says (p. 4095), "there was a material difference in the class of freight carried; for instance, the products of mines decreased 818,000 tons; the product of agriculture increased 290,000 tons; the products of animals increased 106,000 tons; and the average haul was much less in 1909 than in 1901, showing a growth of local freight traffic, the rates of which are generally higher than through rates. In other words, the slight change in the actual rate would be accounted for by those changes in the character of freight carried and in the character of the freight as dependent on classification, and the character as distinguished between local and through. For instance, the average haul in 1901 was 343 miles, and in 1909, 267 miles."

Now, then, it appears from these itemized, statistical tables, that there was a saving to the public—as a result of the improved methods, the betterment and expansion of the two companies, and the economies of administration achieved—of $62,469,000.00 in the price of transportation on the Southern Pacific line, and $91,534,000.00 on the Union Pacific; a saving to the public from 1901 to 1909, on both lines, of $154,003,000.00 (p. 4096).

Notwithstanding the economies of better instruments and better methods, the ratio of operating expenses to earnings of the Union Pacific for the decade 1899-1909, also for the Southern Pacific, is shown to be as

follows, by Mr. Kruttschnitt (p. 4181): For the Union Pacific, "1899, 52.16; 1900, 51.59; 1901, 53.60; 1902, 50.92; 1903, 53.53; 1904, 52.51; 1905, 51.19; 1906, 52.41; 1907, 53.36; 1908, 54.83; 1909, 48.18. Southern Pacific: 1899, 64.22; 1900, 64.78; 1901, 63.56; 1902, 65.71; 1903, 68.27; 1904, 67.98; 1905, 66.65; 1906, 64.49; 1907, 64.21; 1908, 68.68; 1909, 62.89." Referring to the years 1908 and 1909, Mr. Kruttschnitt says (p. 4158): "The difference shows the extent to which expenditures had been deferred. It is notorious that every road, under the stress of these hard times (1907 panic, p. 4181), with one strong influence opposing reduction of wages and other strong influences opposing increase in rates, was, to use a vulgar expression, between the devil and the deep sea; and they had to work out their own salvation. They worked that out by more efficient management, and by deferring to some more propitious day or more prosperous time expenditures that could be deferred." And in speaking of the misleading nature of a comparison between the Union Pacific operating ratio of 1899 and that of 1909, Mr. Kruttschnitt says (pp. 4157-8): "The examination of two years is misleading. The fact is that in 1908 and 1909, all roads in the country were still skimping their expenses to make showings; in other words, there were deferred expenditures; 1908-9 was an unusually low year for expenditures. The previous year, 1907-8, instead of showing a ratio of 47 per cent, showed a ratio of 54 per cent—over 10 per cent higher than 1909. In other words, there is a hereafter which we have got to meet. And all of the roads, after this panic of 1907, which was one of the worst for the railroads

that they ever knew, had to do everything possible to meet these increases in material and labor, because there was no other way to meet them than by deferring expenditures and by increasing efficiency."

For the Union Pacific, as Mr. Kruttschnitt shows: "From 1898 to 1909 inclusive, the preferred stock paid an average dividend of 3.67 per cent; the common stock an average dividend of 5 per cent, but in that average is taken 4 per cent paid annually from 1907 to date on investments [the proceeds of the sale of the Great Northern and Northern Pacific distributed *pro rata* in the liquidation of the Northern Securities Company, will be recalled here], and not from transportation operations" (p. 4182).

He gives the details (p. 4182): "In 1898 the preferred paid nothing, and from 1899 to 1909, it paid 4 per cent annually. In 1898 and 1899, the common paid nothing; in 1900, 3½ per cent; 1901, 4 per cent; 1902, 4 per cent; 1903, 4 per cent; 1904, 4 per cent; 1905, 4½ per cent; 1906, 6 per cent; 1907, 6 per cent on transportation operations, 4 per cent on investments; 1908 and 1909, the same as 1907. The average for both preferred and common was: for 1898, nothing; 1899, 2.31 per cent; 1900, 3.75 per cent; 1901, 3.96 per cent; 1902, 4.02 per cent; 1903, 4 per cent; 1904, 4 per cent; 1905, 4.19 per cent; 1906, 5.30 per cent; 1907, 7.98 per cent; 1908, 7.98 per cent; 1909, 7.92 per cent—average for the period, 4.62 per cent."

For the Southern Pacific dividends, he gives these figures (p. 4182): "In the years 1898 to 1904, there was

no preferred, as I remember it, and it paid nothing; from 1905 to 1909 inclusive, it paid 7 per cent. The common from 1898 to 1905 inclusive, paid nothing; in 1906, 2½ per cent; 1907, 5¼ per cent; 1908, 6 per cent; 1909, 6 per cent—an average for the period of 1.64 per cent.

"Q. You are now speaking of preferred and common?

"A. Yes. In 1905, the average was 1.2 per cent; 1906, 3.2 per cent; 1907, 5.6 per cent; 1908, 6.3 per cent; 1909, 6.4 per cent—an average for the period of 1.9 per cent.

"Q. Have you a statement of the average rates of dividend paid on stocks by all railroads of the United States, and in that same connection the dividends declared for 1908 upon dividend paying stock?

"A. Yes. The average rate of dividends paid on stocks by all railroads in the United States in 1909, on the authority of Poor's Manual. Do you want the whole list?

"Q. If you please.

"A. In 1898, 1.71 per cent; 1899, 1.92 per cent; 1900, 2.44 per cent; 1901, 2.65 per cent; 1902, 2.97 per cent; 1903, 3.03 per cent; 1904, 3.31 per cent; 1905, 3.27 per cent; 1906, 3.63 per cent; 1907, 3.73 per cent; 1908, 3.50 per cent—or an average for the period of 2.92 per cent. In its 23rd Annual Report, the Interstate Commerce Commission, on page 62, says as to all railroads in the

United States for 1908: 'The amount of dividends declared during the year was $386,879,000, being equivalent to 7.99 per cent on dividend paying stocks.' Now, answering the second part of Mr. Dunne's question: For the same year, 1908, the Union Pacific averaged on its preferred and common stock 7.98 per cent, and the Southern Pacific Company 6.30 per cent."

The question of the physical properties of both lines is gone into by Mr. Kruttschnitt literally, graphically, protographically, with searching and illustrative detail —for both lines, and from every point of view (pp. 4104-4119); of equipment, and method and expedition of service (pp. 4115-4135); of taxes per mile of road (p. 4135); of comparative revenue returns, per mile of road on the various systems (p. 4136); of the transfer of the Sunset terminal from New Orleans to Galveston, the improved and ampler service involved therein, and the expenditure of over $2,000,000 for the new terminals (pp. 4137-4140); the increase of the Sunset fleet by four steamers in 1901, at a cost of $2,226,000, and in 1902 by two more steamers at a cost of $1,092,000, and in 1906-7 by three more steamers at a cost of $3,113,000; and the expansion of the tug and lighterage service of the Sunset at New York, adding five tugs and forty-two lighters, and acquiring, instead of hiring, a lighterage plant (pp. 4137-4140).

We quote the following testimony from Mr. Kruttschnitt (p. 4104). It will speak for itself:

Q. Mr. Kruttschnitt, will you mention some of the important improvements that have been made in the condition of these roads since 1901?

A. On the Union Pacific the policy started in 1898, of reducing grades, taking out curves, ballasting, improving terminals, and block signalling, was continued subsequent to 1901 and has been continued really up to the present day. On the Union Pacific, some of the particular items might be mentioned, such as the change of line between Omaha and a point about 22 miles west of it, by building what is known as the Omaha-Lane cut-off, which substitutes for a high grade single track line with very heavy curvature and for a considerable part of its distance through a thickly settled community, a low grade double track line with very straight alignment, with few or no grade crossings on it, which can be operated at very high speed, and with a reduction of distance in the 22 miles of about 10, or nearly 50 per cent. A second notable improvement was the reduction of the summit of the Union Pacific over the Rocky Mountains, and a substitution of a road with excellent alignment, fully ballasted, and for nearly all of its distance double tracked in place of the old line which was very crooked and climbed the summit several hundred feet higher than the present one, and was single track. Both of these lines have been fully protected by the most modern block signal devices. On the Union Pacific, between Omaha and Ogden, there have been built, at the present time, rather over 400 miles of double track, and there must be from 150 to 175 miles authorized and under various stages of construction. All of the main line of the Union Pacific, some of its line from Cheyenne to Denver, and some of its Kansas division from Kansas City to Denver, has been thoroughly and absolutely protected by the

most efficient means of automatic electric block signalling known. When I say Union Pacific, passing on to the O. R. & N. and Short Line the policy of block signals has been followed there; and the main lines of those two roads are well advanced in block signalling. The O. R. & N. is complete, from one end to the other, from Huntington to Portland; and the Oregon Short Line, for a considerable part of its mileage is complete. So to-day the Union Pacific has a larger percentage of its main line track on which its traffic is densest and the risk of accident greatest, protected with high grade block signalling, than any road west of the Mississippi River, and it is exceeded in that respect by very few roads east of the Mississippi River. At the same time, on the Union Pacific, freight division terminals have been increased as to trackage and have been remodeled, making the work of switching, marshalling and breaking up trains, quicker and more efficient. Water stations have been increased; ballasting has been pushed; the standard of rail has been raised from 70 and 75 pounds to 90; and in the renewal of small structures, metal, concrete and masonry have been substituted for timber. As to the Southern Pacific, some of the principal items of improvement have been the Bay Shore cut off, giving a new entrance to the Sunset lines into the City of San Francisco, avoiding very heavy grades, very crooked track, through a densely settled part of San Francisco, substituting for a single track a double track at water grade, reducing distance about 4 miles between common points, and crossing every street in San Francisco that is crossed, at separated grades instead of at grade. The second notable improvement has

been the construction of what is known as the Dumbarton cut-off. This is also on the Sunset Line, and will enable trains from the San Joaquin Valley lines of the Southern Pacific to come into San Francisco over a bridge, in lieu of transferring over the ferries—as they do at the present time.

Q. You mean by "ferries," if I may interject, the ferries from the Oakland to the San Francisco side of San Francisco Bay?

A. Yes. I thought I said "across San Francisco Bay" I should have said it; in lieu of the ferries connecting Oakland and San Francisco. The second notable improvement on the Sunset Line has been the new line between Montalvo and Burbank, by which a low grade line, with low curvature, has been substituted for a very crooked line with numerous choppy grades. The policy of double tracking has been followed on the Southern Pacific also, double tracks having been built from San Francisco to San Jose, from Los Angeles to Burbank, and from Los Angeles to Shorb. In Arizona and New Mexico, construction has been begun on a line in the canyon of the Gila River, which will eventually give a low grade line for a long distance as against lines with very obstructive grades now being operated. Extensive improvements have been made in the terminals at San Francisco, Oakland, Los Angeles, San Jose, and at almost every freight terminal on the entire system. Sidetracks have been lengthened. Renewals of light metal and wooden bridges have been made with modern steel bridges of

the heaviest specifications. On the lines east of El Paso, over two millions of dollars have been spent in building an ocean terminal at Galveston, for the accommodation of the Company's New York and Galveston fleet. At Avondale, 10 miles above New Orleans, a ferry transfer has been put in, to enable the passenger trains to enter the modern passenger station of the Illinois Central, in the heart of the city, the Southern Pacific before that time having had such poor passenger terminals in New Orleans as to be negligible; indeed, they were so poor that the passengers alone crossed the river; the baggage cars were ferried; and it made a break for the passengers in crossing the river. At present, the whole train is ferried, and passengers do not leave the train until they reach the Union station. In the suburban lines around San Francisco Bay, steam motive power is being abandoned and electric motive power installed. Numerous additions have been made to the company's fleet of steamers plying between New York, on the one hand, and New Orleans and Galveston on the other. A number of these ships have been delivered, and four very large freight ships are now under contract for delivery in the latter part of 1910. Automatic block signalling has been pushed on the Southern Pacific lines, as it has been on the Union Pacific, primary attention being given to the main lines. So, in connection with the Union Pacific, the line from the Missouri River to San Francisco Bay, is now fully protected by the highest grade of electric block signalling. And on the Sunset line, from San Francisco to New Orleans, a very considerable part of the mileage has been pro-

tected, and future additions to this equipment are being made on this line, it receiving second attention on account of its much less traffic density than the Southern Pacific's line from San Francisco to Ogden. On the lines east of El Paso, in the past four or five years every metal bridge that had been put in the line in the construction in 1882 and 1883, has been removed and replaced with very much heavier steel structures. Sidings have been lengthened, terminal properties purchased, and equipment added to very generously; as a result of which the property is in a very high state of efficiency. There are some photographs here of these various improvements, selected from a large collection, that possibly will illustrate some of these points, showing the standard of bridge construction, station construction, terminals, block signals, bridges, and so on. In listing these improvements on the Southern Pacific I should like to add an allusion to the Ogden Lucin cut-off—perhaps the most important improvement they have ever made. It escaped my memory. That is the low grade line across Salt Lake, saving 44 miles of distance in 144, and saving a climb over the Promontory Mountains. And another piece of work of great importance, which is now perhaps half finished, is the reconstruction of the line over the Sierra Nevada Mountains from Rockland to Colfax, a distance of 32 or 33 miles, substituting a 1½ per cent grade with good alignment, suitable for fast time, for a road with 2.2 per cent grades and extremely crooked; the new line being intended as an up-hill track, the old one as a down-hill track, so that, incidentally, those 33 miles will be double tracked."

The photographs referred to by Mr. Kruttschnitt were put in evidence, and are defendants' Exhibits 74 to 98, both inclusive (pp. 4107-8). Mr. Kruttschnitt further shows, that whereas, in 1901, the Union Pacific and Southern Pacific, together had but 89 miles of line protected by automatic signals, on June 30th, 1909, they had in operation 5,324 miles of line protected by those signals, "considerably over one-third of the entire mileage operated with those signals in the United States" (p. 4108). Again, Mr. Kruttschnitt shows that for the last decade, the amount spent for maintaining track and equipment, per mile, on the U. P system, averaged $2,327; on the Southern Pacific $2,676; on the Atchison, $2,282; Northern Pacific, $2,095; Great Northern, $1,648; Denver & Rio Grande, $1,738; Chicago & Northwestern, $1,921; Chicago, Milwaukee & St. Paul, $1,633.

Again, speaking of the Sunset terminals at Galveston, as compared with the freight terminal formerly used at New Orleans, or more precisely, at Algiers, Mr. Kruttschnitt says:

"The Algiers docks had a frontage of 1,775 feet, accommodating four large steamers. 71 freight cars could be placed for unloading at the steamers. The capacity of the yards serving the docks was 281 freight cars. At Galveston we have 6,235 feet of dock front; 14 steamers can be accommodated; 547 cars can be placed opposite these steamer berths for unloading, and the yards serving the docks have a capacity of 1,225 freight cars. I have here separate photographs of these docks which I did not have yesterday when

I offered the other photographs. These were in the mails and I had not received them yesterday.

MR. DUNNE: These photographs are in book form, and we will have the book marked as one exhibit—as Defendants' Exhibit 110, and I offer them in evidence, and the same stipulation may apply as to exhibits 108 and 109."

Again, speaking to the Sunset service, Mr. Kruttschnitt testified:

"Q. As between 1900 and 1901 and 1909 have you any expressions of the gross tonnage of the steamers of the Sunset Route?

A. Yes. In 1900, the tonnage—did you ask for the additions to the fleet?

Q. No the tonnage.

A. In 1900 the tonnage of the fleet was 43,478, in 1901 56,554, in 1909, 87,568—an increase in the latter year over the first of 55 per cent. By tonnage, I mean the tonnage of the vessels in the fleet.

Q. You spoke of additions to the fleet. What have those additions been?

A. In 1901 we added 4 steamers to the fleet, aggregating 18,448 tons, at a cost of $2,226,000. In 1902 we built 2 steamers, aggregating 9,664 tons, costing $1,092,000; in 1906-7 we added three steamers, aggregating 20,196 tons, costing $3,113,000. We have under contract at the present time, for delivery in the

latter half of this year, 4 large freight steamers, aggregating 26,000 tons, to cost $2,350,000. That is to say, from 1901 up to and including the vessels for delivery within a few months, have been added or will be added 74,308 tons, at a cost of $8, 782,000. That will increase the total tonnage of the coast fleet from 87,568 at the present time to 113,568.

Q. Has there been any improvement in the speed of the boats?

A. There has. The vessels added in 1901 were 15-knot ships; the New York steamers in the fleet before that were 12½ and 13-knot ships; the vessels added in 1906 and 1907 were 16-knot ships, and the vessels under contract at the present time are 16-knot ships. Or, expressed in another way, the older vessels of the fleet took an average of about 160 hours between New York and Galveston, the next lot of vessels 136 hours, and the last 3 completed, as well as the 4 now under contract, will take about 119 to 120 hours.

Q. Referring again to the Sunset service, what has been the situation in respect to tug and lighterage service from and after 1901?

A. Prior to that time the lighterage service in the port of New York was conducted by outside concerns under contract. Of course the ability of the company to control tonnage is largely dependent on the efficiency of this terminal service. The lighterage service with the steamship is a good deal like the switching service at a terminal with a railroad. And since that time we

have added 5 tugs and 42 lighters to the coast plant, which have very greatly increased its efficiency and its ability to control the traffic.

Q. Have you a memorandum in respect to the tonnage of the tugs, barges, and lighters?

A. In 1901 we owned 1 tug, 150 tons burden; in 1909 we owned 5 tugs, 780 tons; 3 barges, 1,078 tons, and 39 lighters, 10,259 tons.

Q. Have you built any passenger ships, ships doing passenger service, since 1901?

A. Yes, we built the "Momus," the "Antilles," and the "Creole." These are very large vessels, 16 knots, and with the very finest passenger accommodations.

Q. Do you recall the year or years when they were built?

A. Yes, those were the three vessels that were built in 1906-7.

Further detail in respect to the different lines and parts of lines will be found in the testimony of Mr. Mohler, Mr. Park, Mr. Lincoln, Mr. O'Brien, Mr. McCormick, Mr. Fee, Mr. Lomax, Mr. Calvin, Mr. Fay, Mr. Brewer, Mr. Richardson, covering the Union Pacific proper, the Short Line, the Navigation Company, the Southern Pacific from Ogden to California, with the north and south lines, and the Sunset line, water and rail (Record, Vols. IX, X, XI).

It would be beyond tolerance, in this brief, to go into any detailed presentation of this testimony.

It is scarcely worth while to notice some criticism made at the Salt Lake hearing to the effect that a 54-hour train scheduled on merchandise had been maintained between Omaha and Ogden in 1900, while in 1907, the schedule, which had been progressively lengthened was 100 hours and 45 minutes. Indeed, at one time, in 1897, there was a 32-hour train, put on as a kind of war measure, when there was trouble between the Oregon Short Line and the Union Pacific Receivers. Mr. Munroe tells that story (p 4037). Mr. Kruttschnitt testifies concerning the 54-hour train, of 1900, and the succeeding schedules (pp. 4125-7). He says, "we could maintain it now, by practically sidetracking everything else and making it a preferred train, but we don't want to do that—it is not wise and not right" (p. 4127). This incident is also gone into by other operating witnesses. Some reference is also made in the record to the circumstance that a train on the Sunset line, running twice a week, sometimes tri-weekly, during the winter season only, put on in 1894, was discontinued April 21, 1902. It was not a paying train; daily service, better service, service that the public called for, was substituted. Mr. McCormick goes into the matter fully (pp. 4629-4636). His testimony on the whole matter of passenger service is exhaustive. This incident is covered by other witnesses also.

The operating revenue of the Union Pacific, for the fiscal year ending June 30, 1900, was $39,147,697.33 (p.

4905). For the succeeding fiscal years, the showing is made year by year (pp. 4905-6). For the fiscal year 1909, the operating revenue was $78,750,461.55. A similar statement is given for the Southern Pacific Company (pp. 4907-8). For the fiscal year 1900, the operating revenue was $63,920,414.22; for 1909, $120,-521,908.74.

Some idea, therefore, may be gathered of the extent to which these two connecting lines, in harmonious and preferred relation, have fostered and expanded commerce, made returns to their stockholders, and served the requirements and saved the money of the public. The history of the Union Pacific and Southern Pacific, since the reorganization and the stock purchase, is one of achievement and development, reflected in the commerce of this country from the Missouri River to the Pacific Ocean, from the Atlantic Seaboard to the Gulf, from the Gulf, through the States and Territories of the southwest, again to the Pacific Ocean. The administration of these two lines, in connective relation has developed that commerce enormously. In making for the permanency of the connective relation of the Union Pacific-Southern Pacific line, it has assured, increased, intensified competition for transcontinental business, to which such lines as the Santa Fe and the now constructed and operating Western Pacific, a completion of the Gould transcontinental system, are parties. The best interests of those most deeply concerned, not the stockholders only, though they are entitled to consideration, but the producers, the manufacturers, the distributers, the consumers of the terri-

tory served by the two companies, will not be promoted by a disturbance of the present status of these connecting lines. It is submitted that such a result would not be required by earlier precedents in this Court; it is believed confidently that such a result will not follow from the latest and most authoritative exposition of the statute.

II.

The Northern Pacific and Santa Fe stock purchases.

It was only to eke out a case, to give a color and create an atmosphere, that the Northern Pacific and the Santa Fe have been made an issue;—not to speak of the San Pedro, where the line was yet to be brought into being, and was constructed by joint action.

NORTHERN PACIFIC STOCK PURCHASE SEEN IN THE LIGHT OF THE BURLINGTON CONTROVERSY.

The Northern Pacific stock was bought by the Union Pacific for cash, in the market, single handed, and in battle against a combination of the Northern Pacific with the Great Northern. The Union Pacific had not been contemplating the Northern Pacific with any longing or absorbing eyes, nor, for the matter of that, the Burlington. The Burlington was its connection, originating and interchanging business. There was competition between them, too, more or less sharp, in the territory served by the Union Pacific proper. But it was not war to the knife, in the sense that unfair, discriminating, unlawful and scalping methods were resorted to. The Union Pacific was satisfied with the *status quo*.

But when the two competing lines from the North combined to gather in the Burlington, the Union Pacific took alarm; it resented the descent of the Colossus of the North; it apprehended, it suspected, perhaps with an injustice of misgiving that larger knowledge may have removed, that the methods of controversy, under the new dispensation, would be a war to the knife, with its full implications. It demanded, then, to be let into the Burlington purchase in preservation of the *status quo ante*. It was refused. Then came the strife in the market place for Northern Pacific stock, not as a first objective, but only as incidental to a place and influence in the administration of the Burlington. The transcontinental line of the Northern Pacific, as such, was never the object of acquisition by the Union Pacific.

This is all brought out with fullness of information, in the testimony of Mr. Schiff and Mr. Kahn, both of whom were actors in the Burlington struggle. Their testimony is valuable and enlightening, not only for the knowledge of this case, but as matter of history. It certainly disposes of any suggestion that the Northern Pacific stock was purchased with a view to monopolize transcontinental business in which the Northern Pacific was engaged, or with any purpose that addressed itself primarily to the Northern Pacific at all; and it is followed and endorsed in the finding of the Circuit Court. We have set forth its material portions in the Appendix (pp. 71, 77).

The testimony of one of the great actors in the struggle was not given. Mr. Harriman passed away on September 9th, 1909. The defendants began the

putting in of their case on February 15, 1910 (p. 3889). Mr. Harriman's examination, as far as it went, had been at the instance, and in the course of the testimony presented by complainant at the investigation, preliminary to this suit, conducted by the Interstate Commerce Commission. The history, then, of the struggle for the Burlington is given by Mr. Schiff and Mr. Kahn. The purchase of the Huntington stock and the purchase of the Northern Pacific stock did not converge. They had no common focus. The one was bought to assure to the Union Pacific a preferential relation with its connecting line to California. The other would never have been purchased, not a share of it, if it had not been for the descent from the North upon the Burlington. The disturbance of the *status quo* between the Union Pacific and the Burlington was sought to be averted by the purchase in the market of Northern Pacific stock. The control of 99 per cent of Burlington stock by the Northern combination was looked upon with distrust and misgiving—it may be, to the undue disparagement of the ethical standards of the stranger —as importing into a competitive relation which had been consistently but fairly maintained, methods that were "underhanded and cut-throat" (p. 4744). The Union Pacific did not set out, in a war of aggression and conquest, to take the Northern Pacific prisoner, and chain it to the chariot wheel of the victor. It is to meet that insinuation and to dispel that atmosphere, that we have gone at disproportionate length into the history of a condition which is now of academic interest merely. For the Northern Pacific stock purchases are academic only, and a mere thesis. The Union Pacific today does

not own a share of Northern Pacific stock, or of Great Northern either—though it received about 21 per cent of Northern Pacific, and about 20 per cent of Great Northern, as its *pro rata* allotment in the liquidation of the Northern Securities Company. The last Northern Pacific was sold on November 19, 1908, the last Great Northern, April 6, 1909 (Record, p. 4872). If the purchase of the Southern Pacific stock by the Union Pacific was not a contract or combination within the first section of the Statute, if it was not an attempt to monopolize within the second, nothing subsists between the Union Pacific and the Northern Pacific, or between the Union Pacific and the Great Northern, to go in impeachment of that transaction.

The finding of the lower court is responsive to the testimony.

> "In 1901," says the Circuit Court, "the Northern Pacific Company acquired a controlling interest in the Chicago, Burlington & Quincy Railroad which was a natural and actual feeder to the Union Pacific Company. After an unsuccessful effort to secure from Mr. Hill, who acted for the Northern Pacific Company, a partial interest in that purchase, *in order to insure a continuation of the fair and equitable relations which had theretofore existed between the Union Pacific and Burlington Roads, Mr. Harriman purchased for the Union Pacific Company a majority of the capital stock of the Northern Pacific Company,* including in his purchase more of the preferred than of the common stock. The preferred by action of the board of directors of the latter Company was soon retired. The Northern Securities Company was

afterwards organized and the common stock transferred to it. Upon its dissolution in 1905 the Union Pacific Company was required to accept a part of the stock of the Great Northern Railway Company in lieu of some of its former holdings in the common stock of the Northern Pacific Company (*Harriman* vs. *Northern Securities Co.*, 197 U. S., 244). If the Union Pacific Company acquired any controlling or influential interest in the management of the Northern Pacific Company, these things resulted in the loss thereof. Finally, in the years 1908 and 1909 holdings of the Union Pacific Company in Northern Pacific or Great Northern stock entirely ceased."

SANTA FE STOCK PURCHASE.

The money that paid for the Santa Fe preferred stock, bought by the Union Pacific five years after the Southern Pacific purchase and five years after the Burlington struggle—ten millions of Santa Fe preferred—came from the proceeds of the sale in market of this very Northern Pacific and Great Northern stock which had been distributed to the Union Pacific in the liquidation of the Northern Securities Company.

In 1904, Mr. Harriman and some of his associates bought $30,000,000 of the common stock of the Santa Fe at prices which made it "a very attractive investment, and when we had enough profit on it we sold it out." All of this common stock was sold out in 1906; and the Union Pacific sold all of its Santa Fe preferred stock in 1908 (p. 4722). The history of the Santa Fe stock, common and preferred, its purchase and its disposition, will appear from the testimony of Mr.

Kahn, also of Mr. Schiff, which we have quoted in the Appendix (p. 90).

All other considerations apart, therefore, the allegations in paragraph VII of the bill concerning the purchase of Santa Fe stock and the "partial" control of the Santa Fe, came to naught. The foundation, such as it was, has fallen away, as also of the injunctive relief in respect to voting and collecting dividends, prayed in the bill.

The Circuit Court disposed of the Santa Fe stock purchase as follows:

> "The transaction of 1904 by which a syndicate of men interested in the Union Pacific Company purchased for their individual account $30,000,000.00 in face value of the stock of the Santa Fe Company and the investment in 1906 of $10.000,000.00 by the Union Pacific in acquiring five per cent of that stock are not claimed to have conferred any actual power of control upon the Union Pacific over operations of the Santa Fe Company. The proof does not disclose that any such control was acquired or attempted to be exercised. Even if the motive of the purchasers was to gain some inside information concerning the operations of the great competitor of the Union Pacific Company, they chose an entirely lawful way for doing it, and their acts afford no reason for judicial condemnation."

There remain the three incidental matters, connected with the Santa Fe, mentioned in our statement of the case, but as to which no specific relief is sought by the bill. The apportionment of Asiatic tonnage by

the Pacific Mail at the Port of San Francisco, has been sufficiently remarked upon. The joint construction of the line from San Francisco through Northern California is also noted in our statement of the case. As Mr. Harriman pertinently said: "Don't get a false impression about that. The Santa Fe had interests up in Mendocino County, some 150 miles north of the terminus of the California & Northwestern road, which was owned by the Southern Pacific Company, and it was not a question of construction of parallel lines so much as it was a question of traffic or trackage arrangements between the lines north of the terminus of the California & Northwestern, and that road itself—*whether a joint ownership was not better than a traffic or trackage alliance*" (p. 761). The third item is the purchase, out-and-out, by the Southern Pacific of a short road, about 90 miles, from the Santa Fe, between Phoenix and Dudleyville, in Arizona Territory.

But the purchase of this short piece of road was only an item in adjustment of intercorporate relations, and it was only an intermediate link in a projected through line, of which, by the terms of the adjustment, the joint use had been preserved to both parties (pp. 974-1014, 980, 1040).

This purchase is not mentioned in the bill, no decree is asked concerning it, the testimony concerning it was put in before the Union Pacific had sold out its Santa Fe stock, presumably from a notion, at the time, of some possible, evidential bearing on the "partial" control ascribed in the bill to the $10,000,000 of Santa Fe preferred.

A more detailed statement of the transaction may, if desired, be found in the Appendix (p. 96), where we set the matter out more at length.

III.

The Joint Construction of the San Pedro Line by the Union Pacific and the Clark Interests.

The San Pedro, Los Angeles and Salt Lake Railroad Company was organized as a Utah corporation on March 20th, 1901, by W. A. Clark and some associates (p. 4793). Unlike the stock interests in the Northern Pacific or the Santa Fe, the interest of the Union Pacific—or the Oregon Short line—in half the stock of the San Pedro line still subsists. As the Circuit Court pointed out in its opinion:

> "The San Pedro line, as originally projected and as ultimately constructed, does not appear to have been naturally competitive with the Union Pacific, Southern Pacific, or any of the subsidiary lines. It is practically a continuation of the Union Pacific or Oregon Short Line southwardly, and, generally speaking, its course is at right angles rather than parallel with either the Union Pacific or Southern Pacific lines. If it, as an existing route, had been acquired by the Union Pacific, it would have served rather as a short cut from Los Angeles to Salt Lake City, to avoid the circuitous route between those points via San Francisco, than as a natural competitor for any of the business of that route. While it was calculated to deprive the Southern Pacific of a long haul on traffic destined between Los Angeles and Salt Lake City and beyond, it would be unfortunate indeed if that fact

should have prevented its construction, especially when it was practically at right angles with the southern line, and much shorter and much better adapted to serve the public. In these circumstances, it, as projected and built, was not in our opinion naturally competitive with the Southern Pacific line as alleged in the bill."

In the dissenting opinion, the dissenting Judge, in speaking of the various phases of incidental traffic, goes on to speak of the San Pedro situation, in these words:

"I agree with the court upon the minor features of the case, including in a general way that of the control of the San Pedro line by the Union Pacific Company. The latter is much as if a railroad company, with a line from the west through Omaha or Kansas City to Chicago, should obtain control of a branch from Omaha or Kansas City to St. Louis. In the absence of a more direct competitive relation than appears here, the Sherman Act should not be held to cover such tangential acquisitions."

The acquisition by the Union Pacific of stock in the San Pedro line is the formal aspect of the matter; the real transaction was an agreement between the Union Pacific and the Clark interests for the joint construction of the Salt Lake-Los Angeles line, and the equal division of the stock naturally followed. The Union Pacific had but one way of reaching Los Angeles, and that was over the Southern Pacific as a connecting line, and then by the long and circuitous detour through Sacramento, California. Whether the

Union Pacific be related to the Southern Pacific as part of the same whole, by virtue of original and entire construction, by one company, from the Missouri River to the Pacific Ocean, as within the contemplation and possibilities of the Pacific Railroad Act, or as a separate and connecting line, with the point of meeting at Ogden, it is clear that the Union Pacific was authorized to enter into relations with another connecting line into California, or, equally as well, to construct a connecting line itself, making a short cut, as the Circuit Court expresses it, and constituting an added and improved facility in its line of transportation. The illustration suggested by the dissenting Judge of a railroad company with a line from the west through Omaha to Chicago, acquiring a branch from Omaha to St. Louis, is apt. The Union Pacific project of a cut-off or short line to the South from Salt Lake to Los Angeles was not a novel one, extemporized on the occasion of the organization by the Clark interests of the San Pedro Company. It was a Union Pacific project, and more than a project, before the reorganization of 1898. It was arrested by the panic and bankruptcy, and the receivership, which preceded the reorganized Union Pacific of 1898. Prior to 1898, the Union Pacific, in the name of the Short Line, had been extended southward through the State of Utah; terminal property had been acquired in Southern California; and the work of construction had been pushed across the Utah-Nevada line, and something like a million in cash had been spent on construction work south of the Utah line. It was the organization of the San Pedro Company which hastened the reorganized

Union Pacific to renew the work between the Utah line and California, with a constructed mileage across the State of Utah, north to south, behind it, and with the necessity before it of decisive action to secure the strategical pass and route through the canon of the Meadow Valley Wash. The Clark interests had undertaken to invade and occupy the constructed grade of the Union Pacific south of the Utah line and leading to the Meadow Valley canon. The Union Pacific went to the courts for protection, and was sustained. It was this litigation, with the impracticability of operating more than one railroad through the canon, and with the outlook, in that desert country, of business certainly not enough for two railroads, scarcely enough for one, that led to the construction of one railroad in the joint ownership of the two constructing parties, the Clark interests and the Union Pacific. There are, said BRAMWELL, *L. J.*, in the *Mogul S. S. Co. Case* (1892), A. C., p. 46, "people who would make a second railway by the side of one existing, saying, 'only the two companies will suffer'—as though the wealth of the community was not made up of the individuals who compose it."

The Anti-Trust Act deals with agreements in undue restraint of existing competitive conditions and "prohibits the continuing or entering into such an agreement for the future" (166 U. S., p. 696). It does not prohibit an undertaking between two men or two corporations, having no actual competitive relation, having in contemplation a business existing only in idea—not to speak of competition which could come only as a sequel—from joining prudentially and making the en-

terprise a common one. (*Standard Oil Case, supra*). The prospect of competition between two railroads across the desert between Utah and California, entering into the mutual knowledge of the parties, where the enterprise lay in project only, and the territory would support but one, might deter the investors, both or either. Without co-operation, as in a joint undertaking, the plans might go unfulfilled. The formation of such a group of investors into a corporation or into a partnership, for the organization of their joint capital and effort, in the development of an enterprise where none had existed before, would not be within the letter or spirit of the statute: "The formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership" (*Trans-Missouri Case,* 166 U. S., p. 696; *Tobacco Case, ubi supra,* p. 648).

> "We are unable," said the Circuit Court in the case at bar, "to discover anything in the transaction except a laudable purpose to adjust differences and construct a line of railroad between the two points which would serve their joint interests as well as those of the public."

The detailed account of the San Pedro situation—its intercorporate, its topographical, its administrative and judicial features, and its contractual aspect, including the minor contracts referred to by the Circuit Court, in which traffic arrangements for through routes and joint rates are embodied—are set forth in the Appendix (p. 102).

IV.

As matter of law, the Union Pacific ownership of Southern Pacific stock was not a control, and did not import, as matter of law, the power, in any view of the case, to restrict competition.

As the Union Pacific and Southern Pacific, in point of substantial fact, are connecting lines, it may not be regarded as of importance to advert to the circumstance that at no time did the Union Pacific ever acquire a majority interest in the stock of the Southern Pacific. But its holding of Southern Pacific stock, as having always been that of a minority stockholder, is one of the actual circumstances in this case, of legal import and consequence, and in the full presentation of the case, it should not be passed *sub silentio.*

It goes without saying that the Union Pacific did not purchase the properties of the Southern Pacific. Those properties are still in the same corporate proprietorship—in the Southern Pacific Company as the owner and depositary of the title and control, with an equity over of participation in its stockholders (*Pullman Co.* v. *Missouri Pacific Co.*, 115 U. S., 587; *Porter* v. *Steel Co.*, 120 U. S., 649, 670). The Union Pacific acquired the status of one of those stockholders—at no time, a majority stockholder. The Huntington stock purchase, as an original quantity, represented about 37½ per cent; it was an interest large enough to make the Union Pacific an influential factor in the management of the Southern Pacific, but so long, only, as a Union Pacific management was in harmony with the will and policy of the majority stockholders. The *power* to con-

trol the Southern Pacific Company, the power to establish and maintain its policy, and to nominate its management, resided, as matter of power, with the majority stockholders always. The power was in them at any time, if disposed to exert it, to organize opposition to the Union Pacific management, and displace it. The men who had lifted the Union Pacific out of the slough of despond, reorganized and rehabilitated it, and made a success of it, commended themselves to the majority stockholders of the Southern Pacific Company, and inspired the confidence of those stockholders, in them, in their policies, in their ability to manage the one road as they had managed the other. Personal confidence in a given leadership by the constituency, and the personal ascendancy that follows, is entirely compatible with the concomitant, if unexerted, power of the constituency to unmake and supersede. The confidence of the Southern Pacific constituency in the Union Pacific management was not misplaced or withdrawn. The Southern Pacific was raised to the same standard with the Union Pacific, its depleted treasury was replenished, and for the first time in its history, its stockholders collected dividends on their stock. At a time when Mr. Hill and his immediate associates "owned only one-third of the stock [of the Great Northern], the *confidence* reposed in Mr. Hill was such that, through proxies, his influence was dominant in the affairs of that company," says Mr. Justice WHITE, in the *Northern Securities Case* (p. 365). The same confidence was reposed by the Southern Pacific stockholders in the men who had reorganized the Union Pacific, although the Union Pacific interest in the stock

was approximately 37½ per cent. As Mr. Justice HOLMES said in the same case (p. 403): "The personal ascendancy of one man may be such that it would give to his advice the effect of a command, if he owned but a single share in each road." None the less, however, the *power*—power to control—would remain with the majority stockholders.

As the Huntington stock purchase was not a control, only approximating control to the extent of 37½ per cent, the testimony of Mr. Kahn in relation to a contemplated purchase—already noted in discussing the Northern Pacific transaction—of from 10 to 15 per cent of the Burlington, is pertinent: "I think 15 per cent of compact holding in any property is sufficient to prevent stockholders being stampeded. It is sufficient to form a nucleus for opposition to any scheme which those 15 per cent consider unwise and not in the interests of the property. It is a compact and therefore an influential minority holding, the value of which is mainly in the negative, mainly in the power to oppose infliction and to enforce publicity, far more than its positive value. Fifteen per cent have no positive power to control, neither does 30 per cent give positive power of control" (p. 4742).

And again, speaking of the *power* of the majority stockholders to displace Union Pacific control, however absolute, of the management, Mr. Kahn testifies (p. 4736):

"Q. Now, the Union Pacific had complete control of the management of the Southern Pacific, with power

to elect the Board of Directors, and had done so from 1901 down, hadn't it?

"A. Yes.

"Q. Previous to this purchase [meaning the purchase of additional stock, in anticipation of Federal legislation, up to 46 per cent]?

"A. Yes.

"Q. It was not in any sense necessary to purchase this additional stock to give the Union Pacific control of the Southern Pacific, was it?

"A. Absolute control, yes." It must not be understood that by the use of the term, "absolute control," Mr. Kahn means to ascribe to the Union Pacific a control in the sense of power of control, residing in the majority stockholders, on which so much stress, as will appear, was laid by the Attorney-General in the *Northern Securities Case*. Mr. Kahn's expression must not be wrenched from its context, for he immediately goes on, as part of the same answer, and in the same breath, to say: "It was always possible—*I know a case in point*—it is always possible, even if you own 45 or 46 per cent of the stock of a railroad, for the remaining 55 or 54 per cent, if it is worth their while and there is sufficient reason for it, to combine and make an active canvass against you and turn you out. It has happened."

"Q. But you were not impelled to make that additional purchase on that ground, because you had had the control from 1901 down?

"A. The Union Pacific have been able to keep control, *but there was always a possibility that the control might be disturbed.*"

In *Pearsall* vs. *Great Northern*, 161 U. S., p. 671, where the arrangement contemplated the transfer to the Great Northern of 50 per cent of Northern Pacific stock, and the transaction was challenged by a stockholder, it was found by the Court, from evidence said to be cogent, including the guaranty of the Great Northern of the whole issue of reorganized bonds, that

> "nothing less than a purchase of a controlling interest, and practically the absolute control, of the Northern Pacific, is *contemplated* by the arrangement. With half of its capital stock already in its hands, the purchase of enough to make a *majority* would follow almost as a matter of course, and the mastership of the Northern Pacific would be assured."

When the *Northern Securities Case* was before the Circuit Court (120 Fed., p. 726), it was said:

> "The fact that the ownership of a *majority* of the capital stock of a corporation gives one the mastery and control of the corporation, was distinctly recognized and declared in *Pearsall* vs. *Great Northern Railway*, 161 U. S., pp. 646, 671. The same fact has been recognized and declared by other Courts." And again (p. 726), "the point involved is whether the ownership of all of the stock of two competing and parallel roads vests the owner thereof with the *power* to suppress competition between such roads." And further, speaking of "such a *combination* as is last

> supposed," it is said (p. 726): "By what has been done, the *power* has been acquired and provision made for maintaining it, to suppress competition between two interstate carriers who own and operate competing and parallel lines of railroad."

To the same effect, in *Noyes on Intercorporate Relations*, Section 294:

> "A corporation which owns a *majority* of the shares of the capital stock of another corporation controls it."

Could the majority stockholders of the Southern Pacific, or one, two or three stockholders, owning a majority of the stock—under legislation making them proper parties complainant—bring and exhibit a bill in equity against the Union Pacific and Mrs. Huntington and those who were about to sell their holdings with her, or could the Board of Directors of the Southern Pacific Company, on a resolution of the majority stockholders and in the name of the Company, bring and exhibit a bill in equity against the same respondents—to enjoin the sale of the stock, on the ground that 37½ per cent thereof would divest complainants of the control of the company?

Was the ownership by the Union Pacific of 37½ per cent of the Southern Pacific stock for the year between 1901 and 1902—sufficient, it appeared, to enable it in the absence of objection, to nominate the management—a *power* of control, and an unlawful status? And if it was not, did it become more or less so in 1902, when the Union Pacific, as against the

scheme of a Wall Street pool to organize the majority stockholders to the prejudice of the Company's best interests, increased its holdings to about 45 per cent? Or was it more or less so when the Union Pacific later, through sale in the market, reduced its holdings to 42 per cent? Or when, solely in anticipation of Congressional action, proposed by the Administration but not effectuated by Congress, it increased its holding from 42 to 46 per cent? Was it an unlawful status when the Union Pacific, under the decree of the Supreme Court of the United States, stood the adjudged owner of 21 per cent of the Northern Pacific and 20 per cent of the Great Northern, concurrently? Where is the line to be drawn—what is the rational principle of demarcation?

Unless the thing is to be wholly arbitrary, it must be resolved on the principle and conception of *power*—power of control, residing in a majority of the stock. This is the precise position, definitely taken and carefully and deliberately announced by the Attorney General of the United States in his brief in the Supreme Court, in the *Northern Securities Case*. His proposition is stated in these words (p. 106):

"Ownership of a majority of its stock constitutes the control of a corporation when the inquiry is whether a combination or monopoly has been formed to stifle competition between two or more rival and competing railroads."

The Attorney General at once follows his proposition with the statement: "This is *reasonable*, and in the

strictest accordance with the principles of law governing combinations." He goes on to say that the question of a breach of the Anti-Trust Act is, "in the last analysis a question of power, or, to be precise, of the possession of *power.*" He continues: "That is to say, the decisive circumstance in such a case is whether the alleged combination or monopoly has the *power* [italics his] to stifle competition, to restrain trade; not whether it is *exercising* the power." Now, then, he goes on:

"And therefore, *by a parity of reasoning,* the question of control, in connecting with the formation of combinations, is likewise a question of *power* [italics his]—of power to control. It is not whether the persons with whom control is alleged to lie, immediately, and in their own proper persons, carry on, operate, and in all respects exercise direct control over the property and business of the corporation. This may be done through the agency of the corporate entity—the trustee for the stockholders—and through officers and directors chosen by the latter. The material inquiry is, has a coterie of persons, by acquiring *a majority* of the shares of each of several rival corporations, obtained such *power* [italics his] over them that they cause competition between them to cease, and in that way, and to that extent, restrain trade or commerce? If so, such persons *control* [italics his] the corporations."

The Attorney General enforces the point further. "This reasoning," he tells the Court, "is not new. It was used by Courts in reaching the conclusion that the

trust form of combination is illegal. That form of combination was condemned because it centered in one body—the trustees—the *control* [italics his] of several corporations, usually competing corporations." "Now," he asks, "what was the nature of this control?" And he answers his own question: "It was purely and simply the control incident to the legal ownership of *a majority or more* of the stock of the constituent corporations, and the resulting right to choose their officers and directors. The trustees did not have the immediate and direct management and control of the property and affairs of the several corporations. The officers and directors of the constituent corporations retained that, just as they do when the attempted *combination* takes the form of a holding company."

He next passes from principle to precedent. "But this proposition," he says, "is not only *in accord with reason;* it is sustained by abundant authority." He then cites several cases in which it is said that the ownership of a majority of stock can control the corporation—citing among others the case of *Pearsall* vs. *Great Northern Ry. Co. (supra)*, and quoting from *Noyes on Intercorporate Relations*, Section 294, the passage: "A corporation which owns *a majority of* the shares of the capital stock of another corporation *controls* it."

Dealing with a remark of the Chief Justice in the case of *Pullman Car Co.* vs. *Mo. Pac. R. Co.*, 115 U. S., p. 578, to the effect that while the stockholders own the property, they are not the managers of the corpora-

tion's business or in the immediate control of its affairs, the Attorney General says:

"There is nothing in this language which contradicts the proposition that ownership of *a majority of its stock* constitutes the *control* of a corporation, when the inquiry is whether the control of two competing railways engaged in interstate commerce has been concentrated in a single body in violation of the Anti-Trust Act." He immediately adds:

"It is sufficient, to constitute such control, that the *majority stockholders* control the company, as the Chief Justice concedes they do; it is not necessary that they should be the managers of its business or in the immediate control of its affairs." Certainly, the Attorney General takes the distinction with transparent clearness between the management of the business upon the one hand, and, on the other, the power, resident in the majority stockholders, to control the corporation. That is the control, he has told us with emphasis and iteration, which the Anti-Trust Act contemplates. He has sought and found in the majority ownership of the stock, a reasonable criterion, in place of an empirical, arbitrary, and variant conjecture (pp. 110-111).

His last word is: "Finally, the ownership of a *majority of the shares* of capital stock of a corporation constitutes the control thereof when the inquiry is whether a *combination* or monopoly has been created by concentrating in a single body the power to stifle competition between rival and competing railroads or other corporations" (pp. 113-114).

V.

The acquisition and ownership by the Union Pacific of the Huntington stock, by out-and-out sale to it by a stockholder in the market, is not, as such, within the power of Congress to regulate, under the commerce clause of the Constitution.

Under our view of the fact, it is unnecessary to consider this question. We think it is clear that the Union Pacific and Southern Pacific are not competing lines, and that the stock purchase imported no undue restraint of trade, either in purpose or in consequence. But going provisionally on the assumption that they are competing, and putting to one side considerations as to the scope and reasonableness of any imputed restraint, then the question here is between the police power of the State and the power of Congress under the commerce clause of the Constitution. In our dual system, the sum of political authority resides in the State, subject to the Constitutional deductions. The authority of the general Government is limited by grant and enumeration—by the terms of that great letter of attorney or political conveyance which we call the Federal Constitution. Undoubtedly, within the sphere of its granted powers, Congress is paramount. But beyond the circumference, lies the vast, relatively undefined, and residual sovereignity of the States, the police power of the State, "the power to govern men and things within the limits of its dominion" (*U. S.* vs. *Knight Co.*, 156 U. S., p. 11). This is a power "originally and always belonging to the States, not surrendered by them to the general

Government, nor directly restrained by the Constitution of the United States, and essentially exclusive." "That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State" (*Knight Case, supra,* pp. 11, 12). And what the Constitution means by commerce, and again, by the regulation of that commerce at the hands of Congress, is explained by Chief Justice MARSHALL in his great judgment in *Gibbons* vs. *Ogden* (9 Wheat, 1):

> "*Commerce* undoubtedly is traffic, but it is something more, it is intercourse. It describes the commercial intercourse *between nations and parts of nations* in all its branches, *and is regulated* by prescribing rules *for carrying out that intercourse.*"

The acquisition and ownership of property by a citizen of one of the States, or by a State corporation —the sale and delivery in Columbus, Ohio, of a buggy, to a citizen of New York, or the sale and delivery in Pennsylvania of a steel rail to a corporation of Utah —is not commercial intercourse between nations and parts of nations, or between States; and it would not be reached or concluded by prescribing rules for carrying on commercial intercourse between nations or between States. The New York citizen is free, if he pleases, to use his buggy in Columbus, Ohio, to make a gift of it to some resident of Columbus, or to sell it in that place. So far forth he is without the confines of Federal authority resting on the commerce clause of the Constitution. The Utah corporation is

under no obligation to remove its steel rail out of the State of Pennsylvania. It is optional with it, as the owner of that property to leave it where it found it, local in character and subject to State regulation. But if the property in either case, the buggy or the steel rail, after it has been acquired and owned by the purchaser, is used by him as a part and item of commercial intercourse between the States; if it is put in the way and stream of intercourse and transit between the States, then to that extent, *and by that measure,* it is subject to such rules as Congress may have prescribed for carrying on that intercourse and transit. If a citizen of New Jersey buys a box of dry goods at Hoboken on the Jersey side of the Hudson River, pays for it, and takes it to his home in the same place, he is engaged in a purely local transaction. If the next day, he puts that box of dry goods on board a steamboat, at one of the Jersey landings, to be transported to the opposite bank of the Hudson River, for delivery in New York, he is employing his property in commercial intercourse between the State of New Jersey and the State of New York. To the extent of that employment, the property is subject to such rules as Congress may prescribe for carrying on commercial intercourse between one State and another. But the acquisition and ownership of the property lies behind. That was a New Jersey matter; an object of exclusive regulation by the police power of New Jersey.

If any citizen should step into a broker's office on Broadway, New York, buy some stock in the Pennsyl-

vania Railroad, pay for it, put the certificates in his pocket, and walk out, would he, or the broker, or the broker's principal, be engaged in commercial intercourse between nations and parts of nations, or between States, and would the acquisition and ownership of those certificates be open to Federal regulation under a power to prescribe rules for carrying on commercial intercourse between nations and parts of nations or between States? Would a State corporation buying those certificates be in any different situation from an individual purchaser, if the State of its domicile had endowed it with corporate power to buy stock; and if, in that executed transaction the issue should afterwards be raised as to whether the corporation acted *intra vires* or *ultra vires*—would that be a question of Federal cognizance? Would it not be a matter of State law wholly between the State and its corporation? (*National Bank* vs. *Matthews*, 98 U. S., 628; *St. Louis R. R.* vs. *Terre Haute R. R.*, 145 U. S., 407-8). The purchase of this Pennsylvania stock is a local transaction, it is not commercial intercourse, the certificate is not even an article of commerce. The language of *Paul* vs. *Virginia*, 8 Wall., 168, is apposite:

> "Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. The contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be

shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect —are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia, would constitute a portion of such commerce."

The citizen of Missouri who buys a steamboat may tie it up until it rots at the wharf of a Missouri River landing. His acquisition and ownership of the boat, so far as it fell within legislative interference, would be a matter for the police power of Missouri. But he might employ that steamboat, if he was so minded, in commerce—commerce, that is to say, between one river point and another, in the State of Missouri, isolated from relations with any other carrier. That commerce would still be subject to the legislature of Missouri, by prescribing rules for carrying on the commercial intercourse served by the boat, not between Missouri and Tennessee, between St. Louis and Memphis, but between one Missouri River point and another. But if the Missouri proprietor should employ his property in commercial intercourse between a Missouri River point and Memphis, Tennessee, the commercial intercourse

would then be interstate, and to the extent of that intercourse and measured by that extent, the property would be subject to such regulation as Congress might make "by prescribing rules for *carrying on that intercourse*" (*Gibbons* vs. *Ogden, supra*). In the employment of that steamboat in the intercourse between Missouri River points, as in the intercourse between a Missouri River point and a Tennessee River point, the ownership of the property has not changed, it is the constant quantity: the variable factor is the intercourse between States. It is the variable factor, says Chief Justice MARSHALL, which is regulated under the commerce clause, and regulated "by prescribing rules for carrying on that intercourse." But the constant quantity, the ownership, abides, for its regulation, in the residual sovereignty, the police power, of the State.

Mr. Huntington left a will by which he transferred to his widow and his nephew some Southern Pacific stock. His widow and his nephew might have been large stockholders, majority stockholders, in the Santa Fe, prominently alleged in the bill here to be a competing line. If Mr. Huntington had made a gift of the Southern Pacific stock, in his lifetime, to Mrs. Huntington and H. E. Huntington, would the acquisition and ownership of that stock by the donees be commercial intercourse between nations and parts of nations, or between States; and would the regulation by law of the ownership thus given be accomplished or approached by an Act of Congress prescribing rules for carrying on commercial intercourse between one State and another?

A will is, after all, a mere conveyance. Is there any difference in principle between a testamentary assignment and a transfer *inter vivos*, from the point of view of the Federal authority to regulate interstate commerce? Or if Mr. Huntington had left no will, and his Southern Pacific stock had devolved, by operation of State law, on his widow and nephew as heirs at law, would the ownership thus resulting have been subject to the power of Congress under the Commerce Clause? It would be a novel consequence, if Congress, under the commerce clause of the Constitution, should be assumed to have been invested with the power to prescribe rules for intestate succession. The distinction between a person and a corporation will not bear importantly on the power of Congress under the commerce clause; for that power is "general and includes alike commerce by individuals, partnerships, associations, and corporations" (*Paul* vs. *Virginia*, 8 Wall., 183) And the want of any relevant distinction is pointed by Section 8 of the Anti-Trust Act, providing that the word "person," wherever used in the Act, shall be deemed to include corporations and associations. It is commerce, in the sense of interstate and international intercourse, to which the power of Congress is addressed, and by which it is measured and limited. The Supreme Court in the *Trans-Missouri Case* (166 U. S., 316-318), speaking of the enactment of the Anti-Trust law, observed: "Some of the members of the House wanted it placed beyond doubt or cavil that *contracts in relation to the transportation of persons and property* were included in the bill." And the Court goes on

to give the remarks of Senator Hoar, in reporting for the Judiciary Committee of the Senate:

> "The other clause of the House amendment is that *contracts or agreements entered into for the purpose of preventing competition in the transportation of persons or property from one State or territory into another shall be deemed unlawful.* That, the committee recommend shall be concurred in. We suppose that it is already covered by the bill as it stands: that is, that *transportation* is as much trade or commerce among the several States as the sale of goods in one State *to be delivered in another,* and, therefore, that it is covered already by the bill as it stands."

And the right of a State corporation equally with the right of an individual citizen, to engage in interstate commerce, is not traceable, for its origin, to the Federal Constitution or to any Act of Congress. "The Constitution found an existing right, and gave the power to Congress to regulate it" (*Gibbons* vs. *Ogden, supra,* p. 211).

The circumstance that a purchaser of stock in an interstate railroad may, whether individual or State corporation, be likewise engaged as an interstate carrier, is not the criterion to which the regulating power of Congress is to be brought. The purchase of a locomotive by the New York Central at Schenectady, or by the Pennsylvania Railroad at Philadelphia, is not, as a matter of acquisition and ownership, a transaction in interstate commerce. It is no more interstate commerce than would be the purchase of that locomotive by an electrical construction company or

a smelter for industrial switching within its own yards. We are not to miss the true point of view in this case by any suggestion that the Huntington stock was bought by the Union Pacific, an interstate railroad corporation. Would it be competent to Congress to pass a law requiring the sale of the Philadelphia locomotive to the Pennsylvania Railroad to be evidenced by a written instrument, attested by two witnesses? Is the purchase of a city block in Omaha by the Union Pacific, as being preferable to a condemnation suit, in the nature of interstate commerce because the Union Pacific is an interstate carrier; or the construction by that company of a general office building; or a contract for the insurance of that building? The nature of the transaction is the thing that tells; not the circumstance that a party to the transaction, the purchaser of the Huntington stock, for example, is an interstate railroad corporation. In the *Knight Case* (*supra*), The American Sugar Refining Co., a New Jersey corporation, engaged principally in interstate commerce, bought the stock of the E. C. Knight Co., a corporation formed under Pennsylvania law "for the purpose of importing, manufacturing, refining and dealing in sugar and molasses." It was held that the purchase of this stock was not an act of interstate commerce or affecting such commerce directly, and the bill was dismissed.

In the *Danbury Hat Case*, however (*Lowe* vs. *Lawler*, 208 U. S., 274), the striking employees were not engaged in interstate commerce at all, but their conduct in directly obstructing commercial intercourse

between the States, as carried on by their former employer, was held to bear directly on interstate commerce, and they were accordingly adjudged to have broken the law.

A railroad, operating under State charter, may begin and end within the State of its domicile. At one of its termini, it may connect physically with another railroad extending to the State line and across that line into another State. The local road accepts shipments at local points destined beyond the State line and finding their way to destination over the local road, as far as it goes, and then over the connecting interstate railroad. It has been held that such a local road, so engaging in interstate commerce, is within the regulating power of Congress, and to such an extent as to be amenable to Federal authority for failure to comply with the Safety Appliance Law (*U. S.* vs. *Colorado and N. W. R. Co.*, 157 Fed., 342). The local corporation, by permission of the State, abandons part of its line, and takes up the track—leaving a gap between its new terminus, fifty miles it may be, and the point where it formerly connected with the interstate line. It goes out of the interstate business. As between its new and purely intra-state termini, it is not subject to the power of Congress under the commerce clause. It is very evident here that an act of ownership by the State corporation, with the permission of the State, has retired, *ad hoc*, the power of Congress to regulate interstate commerce; nor would the Safety Appliance Act affect the State corporation further. The ownership of the intra-state railroad remains all

through, but the use, in the exercise of that ownership, of the instrumentalities of transportation in commercial intercourse between States has been withdrawn. It was only while that use lasted, that Congress had any power to interfere, and to interfere only with the use, not with the ownership. The status of ownership pertains to the police power of the State. The function of Congress is subsequent, and by way of sequel. Whatever that ownership may be, however acquired, Congress starts with it as a postulate and proceeds to regulate, not the acquisition and ownership, but the use of the property in so far as that use, in the exercise of the given quantity—the ownership, that is—falls within commercial intercourse between States. The owner of one interstate railroad may acquire the ownership of the stock of a competing railroad; whether a State railroad corporation may so acquire and own that stock is a question between it and the State of its origin. The dual form of our Government excludes the notion of the ineptitude of the States. They are deemed to be *sui juris* in the exercise of their police power. But let the owner of those two railroad companies put them into a Trans-Missouri Freight Association and make them parties to an agreement with other roads, fixing the price of interstate transportation conventionally, and in undue restraint of the freedom of the public to carry on commercial intercourse between the States, and an ulterior question is presented involving in no sense the question of ownership, but going to the power of Congress to maintain, by appropriate measures, the freedom of interstate intercourse from unlawful restraints.

Indeed, interstate transportation as dealt with and described by the Interstate Commerce Act itself, is in so many words declared to be irrespective of ownership or of any arrangement by contract for the use of the instrumentalities thereof. "The term 'transportation,'" says the first section of the Interstate Commerce Act, "shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, *irrespective of ownership* or of any contract, express or implied, for the use thereof."

The State corporation, therefore, is subject to regulation by Congress only to the extent and by the measure of its engagement in commercial intercourse between the States, and beyond that it is not amenable to Congressional inquiry or regulation as to the source and deraignment of its ownership or the conditions of its business. We are not dealing here with a transaction to which the sale and formal ownership of stock is merely instrumental, and which, in its primary and substantial aspect, is an unlawful combination between two railroad companies or between two bodies of stockholders, acting collectively, to fix the prices of interstate transportation by a conventional agent or committee, and by such means to impede the due course of interstate trade. The question here is one of ownership by out-and-out sale from an individual stockholder or stockholders in the market. In the *Employers' Liability Case*, 207 U. S., 463, it was argued by the Government that the Act there in question was directed to the regulation, not of the employees, but of the carrier, and that the carrier was

subject to such regulation, *because* it was engaged in interstate commerce; and further, it was argued by the Government that "by engaging in interstate commerce the carrier chooses to subject itself and its business to the control of Congress, and cannot be heard to complain of such regulations." And again, it was said for the Government, "that Congress can make a common carrier engaged in interstate commerce liable to *anyone* for its negligence who is affected by it; and if it can do that, necessarily it can make such carrier liable to all of its employees" (Opinion of Court, p. 499).

This theory of a general and encompassing submission of corporate concerns to the power of Congress, because the corporation was engaged in interstate commerce, was not approved. The opinion at p. 502, proceeds:

> "It remains only to consider the contention which we have previously quoted, that the act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the *right* to engage in interstate

> commerce as a *privilege* which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be *otherwise beyond the power of Congress.* It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, *and would destroy the authority of the States as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures.*"

The Supreme Court of the United States, therefore, in the *Knight Case, supra,* was speaking in the light of settled principles and distinctions, when it said of the Anti-Trust Act:

> "Congress did not attempt thereby to assert the power to deal with monopoly directly as such, *or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control, or disposition of property.*"

The special phase of railroad property, interstate railroad property, its ownership, the regulating authority to which that ownership is responsible, has come before the Supreme Court of the United States more than once. *Ashley* vs. *Ryan,* 153 U. S., 436, turned upon the consolidation of interstate roads, and the source of political authority from which the right to consolidate was derived. Under the laws of the State of Ohio, a consolidation had been made of railroads

engaged in commerce through the States of Ohio, Michigan, Indiana, Illinois and Missouri. The Secretary of State of Ohio, pursuant to the laws of that State, demanded a fee for the filing of the articles of the consolidated corporation. Payment was resisted on the ground that the charge imposed was an interference and a burden in respect to interstate commerce. This Court sustained the charge and affirmed the power of the State to consolidate the ownership of these corporations. It was said by the Court (p. 442):

> "The power of corporations of other States to become corporations or to constitute themselves a consolidated corporation under the Ohio statutes, and thus avail of the rights given thereby, is as completely dependent *on the will of that State* as is the power of its individual citizens to become a corporate body, *or the power of corporations of its own creation to consolidate under its law.*"

Again, speaking of the right of consolidation:

> *"The rights thus sought could only be acquired by the grant of the State of Ohio, and depended for their existence upon the provisions of its laws. Without that State's consent they could not have been procured."*

And at p. 446:

> "The question here is not the power of the State of Ohio to lay a charge on interstate commerce, or to prevent a foreign corporation from engaging in interstate commerce within its confines, but simply *the right of the State* to determine upon what conditions its laws as to the consolidation of corporations may be availed of."

And further, at p. 446:

> "Considering, as we do, that the payment of the charge was a condition imposed by the State of Ohio upon the taking of corporate being or the exercise of corporate franchises, *the right to which depended solely on the will of the State*, and hence that liability for the charge was entirely optional, we conclude that the exaction constituted no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof, and that its enforcement involved no attempt on the part of the State to extend its taxing power beyond its territorial limits."

The *Pearsall Case*, 161 U. S., 646, was concerned with the meaning and effect of a State law providing that no railroad corporation or the lessees, purchasers or managers, of any railroad corporation, "shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or *in any way* control any other railroad corporation owning or having under its control a parallel or competing line." An agreement had been made by the Great Northern and the expectant purchasers of the Northern Pacific, arranging, substantially and in effect, as the Court construed it, for the control by the Great Northern of its competitor, the Northern Pacific. Pearsall, a stockholder of the Great Northern, filed his bill to enjoin this arrangement as being in violation of the State law. Jurisdiction of the case was assumed in the first instance by the Circuit Court of the United States for the District of Minnesota, doubtless on a diversity of citizenship; and on appeal the

cause was determined by the Supreme Court. The question was one depending on the power of the State of Minnesota to forbid, by its own will and law, the consolidation of the stock, property or franchises, or the lease or purchase, or the control in any way, by a State railroad corporation, doing in part an interstate business, of a competing or parallel line. The State of Minnesota had assumed the power to regulate the ownership of the stock, the property, the franchises, the control in any way, of competing railroad lines engaged in interstate commerce. Pearsall's bill went upon the power of the State. The Supreme Court, while not considering as a point of judgment, and expressly deciding, the competency of the State to exercise the power assumed, in contradistinction from the power of Congress to regulate commerce, assumed the power of the State as a given quantity, and that assumption was at the basis of its judgment.

The bondholders of the Northern Pacific were preparing to buy in the property on foreclosure and reorganize the company. As such purchasers, they proposed to turn over 50 per cent of the stock of the reorganized company, not to the Great Northern technically, and as a corporate entity, but to the body of the Great Northern shareholders; and in consideration for that stock, the bonds issued by the reorganized company were to be guaranteed, not by the body of shareholders of the Great Northern, but by the Great Northern, *eo nomine*, in its corporate capacity. The Supreme Court held that this was substantially a deal between the Great Northern and the purchasers of the Northern Pacific, for the control by the Great

Northern of the Northern Pacific; *that it was contemplated by the arrangement that* the 50 per cent of stock to the Great Northern shareholders would be followed as of course by the acquisition of what was needed to make an arithmetical majority; and that the control by the Great Northern would be assured. It was said in the opinion (p. 671):

> "But the fact that one-half of the capital stock of the reorganized company is to be turned over to the shareholders of the Great Northern, which is, in turn, to guarantee the payment of the reorganized bonds, is evidence of the most cogent character to show that nothing less than a purchase of a controlling interest, and practically the absolute control, of the Northern Pacific is *contemplated by* the *arrangement*. With *half* of its capital stock already in its hands the purchase of *enough* to *make a majority* would follow almost as a matter of course, and the mastership of the Northern Pacific would be assured."

The court then continues:

> "That the transfer of stock is to be made, *not directly* to the *Company, but to the shareholders,* is *immaterial,* since it may be assumed that they would cast their votes in the interests of the company. Either the *stock so transferred becomes virtually the property of the Great Northern,* or there is no consideration for its guaranty of the principal and interest of the consolidated bonds. But as, by the agreement, the *guaranty* by the *defendant* of the Northern Pacific bonds is assumed to be in consideration of a transfer to its stockholders of one-half the capital stock of the reorganized company, it would inevitably follow that

this stock would be held *for the benefit of the company*. There is, however, in addition to that, an alternative provision that the transfer may be made to a *trustee* for the use of the stockholders, *who would, of course, act as their agent* and represent them *as a body*, and in fact, *stand as the company under another name*. Doubtless these *stockholders* could lawfully acquire by *individual purchases* a *majority*, or even the *whole* of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as such, in common. This, though possible, would not be altogether feasible, and would require considerable time for its accomplishment: In a few years the two companies might by sales of the stock, so acquired, become completely dissevered, and the interests of the stockholders of each company thus become antagonistic. Under the proposed arrangement, however, the Great Northern as a *company*, in return for a guaranty, which the *individual stockholders* could not give, turns over to a *trustee* for the *entire body* of stockholders of the Great Northern one-half of its stock, with the *almost certainty* of the latter securing the complete *control*, and probably the ultimate amalgamation, of the two companies. If such amalgamation were once effected, it would in all probability be final. We think the proposed arrangement is a plain violation of the *acts of the State Legislature* passed in 1874 and 1881, prohibiting *railroad corporations* from *consolidating* with, leasing or purchasing, *or in any other way* becoming the *owner* of, or controlling any other railroad corporation, or the *stock*, franchises or rights of property thereof, having a parallel or competing line."

If the State of Minnesota did not have power to regulate the ownership of stock in competing railroad lines, doing in part an interstate business, then the judgment in the *Pearsall Case* is without foundation.

But while the police power of the State upon the one hand, and the power of Congress to regulate interstate commerce on the other, were not contrasted, examined in the light of that contrast, and pointedly delimited in the *Pearsall Case*, it was upon just such a comparison and discussion that the pressure and strain of the argument and judgment was put, in the *Louisville & Nashville Case*, decided on the same day as the *Pearsall Case*, in an opinion written by the same Justice (161 U. S., 677).

The Constitution of Kentucky provided that "no railroad * * * company shall *consolidate* its capital stock, franchises or property * * * with any other railroad * * * company owning a parallel or competing line; or acquire by *purchase*, lease *or otherwise* any parallel or competing line."

The State of Kentucky filed its bill in the State Court to enjoin the Louisville & Nashville Railroad Company from acquiring the control of the Chesapeake, Ohio & Southwestern, a competing line. It was alleged that the Louisville & Nashville was endeavoring to acquire the capital stock and securities of the Chesapeake & Ohio in order to control that company and ultimately to purchase its franchises and property at judicial sale. The answer admitted that the Louisville & Nashville had purchased the stock and securities, and that it intended to purchase the franchises and property at judicial sale. It owned and operated

a road from Louisville, Kentucky, by way of Nashville, Tennessee, to Memphis, Tennessee. The road of the Chesapeake & Ohio also extended from Louisville to Memphis by way of Cecelia Junction and Paducah. The two lines were held to be parallel and competing. The proposed purchase, therefore, by the Louisville & Nashville was said to be in violation of the Kentucky Constitution "which forbids the consolidation of the stock, franchises or property, as well as the purchase and lease, of parallel and competing lines" (p. 695). This was rested on the police power of the State of Kentucky to regulate the ownership of competing lines (p. 695 *ad fin.*). Various authorities on the police power of the State were reviewed (pp. 695-7). The Court then remarking:

> "We think that the principle of these cases applies to the power of the Legislature to forbid the consolidation of parallel or competing lines, whenever, in its opinion, such consolidation is calculated to affect injuriously the public interests."

Reference is then made to the statutes of several of the States expressive of the policy in those jurisdictions as forbidding the purchase by a railroad corporation of stock in a competing line. It is said (p. 700):

> "that where the *police power* is invoked in good faith for the prohibition of a practice which the Legislature has declared to be detrimental to the public interests, it will be sustained wherever it can be done without the impairment of vested rights."

Still further laying the emphasis on the police power the Court goes on to say that:

> "the general rule holds good that whatever is contrary to public policy or inimical to the public interest is subject to the *police power* of the State, and *within legislative control*, and in the exercise of such power the *Legislature is vested with a large discretion*, which, if exercised *bona fide* for the protection of the public, is beyond the reach of judicial inquiry."

The Court has thus made it clear, and with emphasis and repetition, that the proposed purchase by the Louisville & Nashville, a State corporation, doing in part an interstate business, of the stock and properties of the Chesapeake & Ohio, likewise a State corporation, engaged in interstate commerce, is subject to regulation and prohibition by the State in the exercise of its police power. But the Court is now brought face to face with the objection, explicitly made and pressed, that the assumption by the State "of a right to forbid the consolidation of parallel and competing lines is an interference with the power of Congress over interstate commerce." That was a Federal question that brought this case by writ of error to the Supreme Court of the United States. The first word out of the mouth of the Court in answer to the objection, vindicates the power of the State, as against the authority of Congress, as a police regulation by the State of interstate railways. And the Court makes the distinction between the commerce itself, over which the jurisdiction of Congress is exclusive, and the in-

struments of such commerce, which are subject to the police regulation of the State. The language of the Court (p. 701), dealing with the objection that the right of the State to forbid the consolidation is an interference with the power of Congress under the commerce clause, is as follows:

> "The same remark may be made with respect to all *police regulations* of interstate railways. All such regulations interfere *indirectly*, more or less, with *commerce* between the States, in the fact that they impose a burden upon the *instruments* of such commerce, and add something to the cost of transportation, by the expense incurred in conforming to such regulations. These are, however, like the taxes imposed upon railways and their rolling stock, which are more or less, according to the policy of the State within which the roads are operated, but are still within the *competency* of the Legislature to impose. It is otherwise, however, with respect to taxes upon their franchises and receipts from interstate commerce, which are treated as a *direct* burden. There are certain intimations in some of our opinions, which might perhaps lead to an inference that the *police power* cannot be exercised over a subject confined exclusively to Congress by the Federal Constitution. But while this is true with respect to the *commerce* itself, it is not true with respect to the *instruments* of such commerce."

The vindication of the police power of a State as against the asserted authority of Congress under the commerce clause, is further pursued in a significant

quotation from an earlier decision by the Supreme Court of the United States.

> "It was said," continues the opinion in the *Louisville Case*, "in *Sherlock* vs. *Ailing*, 93 U. S., 99, 103, 104, and quoted with approbation in *Plumley* vs. *Massachusetts*, 155 U. S., 461, that 'in conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might *indirectly* affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a *regulation* of it, within the meaning of the Constitution * * * and it may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the *rights*, *duties*, and *liabilities* of citizens, and only *indirectly* and *remotely* affecting the *operations of commerce*, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or *engaged in commerce, foreign or interstate*, or in any other pursuit.'"

And the Court goes on:

> "It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the *instruments* of such commerce, so far as the legislation was *within its ordinary police powers*. Nearly all the *railways* in the country have been constructed under *State authority*, and it cannot be supposed that they intended to abandon their *power* over them as soon as they were

finished. The power to construct them involves necessarily the power to impose such regulations upon their operations as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their *commerce* and forbid interference *therewith;* while to the States remains the power to *create* and to *regulate* the *instruments* of such commerce, so far as necessary to the conservation of the public interests."

Then comes this pointed language:

"If it be assumed that the States have no right to forbid the consolidation of competing lines, because the *whole* subject is within the control of Congress, it would necessarily follow that *Congress* would have the power to *authorize* such consolidation in defiance of State legislation—*a proposition which only needs to be stated to demonstrate its unsoundness.*"

And if Congress may not restrain the States from forbidding the consolidation, neither may Congress, as remarked by Mr. Justice WHITE in the *Northern Securities Case* (193 U. S., p. 391), restrain the State "from permitting it to take place." And the Supreme Court says further in this *Louisville Case:*

"As we have already said, the power of one railway corporation to purchase the stock and franchises of another must be conferred by express language to that effect *in the charter*, and hence, if the Charter of the L. & N. Co. had been silent upon that point, it will be conceded that it would have no power to make the proposed purchase in this case. As the *power to purchase*, then, *is de-*

rivable from the State, the State may accompany it with such *limitations* as it may choose to impose."

And again:

"While the constitutional power of the State in this particular has never been formally passed upon by this Court, the *power* of State *Legislatures* to impose this restriction upon the general authority to consolidate has been recognized in a number of cases."

The Court then cites a number of its own decisions, the most recent of which is the case of *Ashley* vs. *Ryan*, 153 U. S., 436, to which we have already referred with some fullness. Of this case, the Court says:

"'In the last case it was broadly held that a State, in permitting railway companies to consolidate, might impose such conditions *as it deemed proper*, and that the acceptance of the franchise implied a submission to the conditions, *without which it could not have been obtained*."

A number of cases are next cited by the Court from the various State Courts, with this comment:

"The power to forbid such purchase or consolidation with competing lines has been directly upheld in a large number of cases in the State Courts, in some of which cases *a violation of the commerce clause* was suggested, and in others it was not."

Summing up, the Court says:

"In conclusion, we are of opinion * * * 3. That, conceding that the requisite power existed

> in both the above companies (Louisville Company and Chesapeake Company) Section 201 of the Constitution of 1891 *was a legitimate exercise of the police power of the State*, and forbade such consolidation, at least so far as such power remained unexecuted."

The doctrine of the *Louisville & Nashville* case was re-affirmed by the Supreme Court of the United States in the case of *Mobile, Jackson, etc., R. R. Co.* vs. *Mississippi*, 210 U. S., 187, 202, in which the Court, referring to the consolidation of interstate railroad companies chartered by State authority, holds:

> *"Whether corporations shall remain separate or be permitted to consolidate is a matter of State regulation and provision."*

It is to the police power, then, of the State, not to the commercial power of Congress, that the purchase of the Huntington stock must be remitted. The impressive words of the Court in *U. S.* vs. *E. C. Knight Co.*, 156 U. S., p. 13, are apposite:

> *"It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed; for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of Government: and acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run in the effort to suppress them of more serious consequence by resort to expedients of doubtful constitutionality."*

If, therefore, the consolidation of ownership or the purchase of stock, of State railroad corporations engaged in commercial intercourse betwen the States, is beyond the power of Congress, and lies within the circumscription of State power and policy, it becomes indifferent, so far as the interference of Congress is concerned, whether the railroads are connecting or competing lines. It becomes indifferent whether the Southern Pacific is a connecting line of the Union Pacific, or whether any tolerance is to be indulged of the far-fetched suggestion that they are competing lines. The consolidation of the ownership of connecting lines, the purchase by one connecting line of the stock of another, equally with such consolidation or purchase in the case of competing lines, pertains to the police power of the State. In the case of *Ashley* vs. *Ryan*, 153 U. S., 436, the consolidated ownership was in conecting lines forming the Wabash System. In the *Louisville & Nashville case*, the lines were competing, with common termini at Louisville, Kentucky, and Memphis, Tennessee.

But the policy of the several States, and the consequent expression of their legislative will in statute, may differ. The State of Kentucky prohibited the purchase, at foreclosure sale, by the Louisville & Nashville Railroad Company of the Chesapeake & Ohio. The State of Minnesota prohibited the purchase by the Great Northern of the stock of the Northern Pacific. New York and New Jersey authorized the consolidation of ownership of the Hudson River Railroad and the West Shore Railroad, paralleling and competing

with each other along the banks of the Hudson River. The State of Massachusetts authorized the New York, New Haven & Hartford Railroad Company to acquire a controlling interest in the Boston & Albany Railroad; and it is not too much to say, that the complainant in the suit now at bar, ratified the action of the State of Massachusetts by dismissing the bill exhibited under the Anti-Trust Act, in which the acquisition of control by the New Haven Company had been challenged. If then, the policy and legislation of the States may thus differ, it is at once apparent that the uniformity of application and exercise, which inheres in the substance of the Federal power to regulate interstate commerce, must be excluded. The authority of the State Legislature in the premises is inconsistent with the assertion of a power in Congress which would and could prescribe a rule only by prescribing a uniform rule. The matter here is not one for purely local regulation, like the case of Pilotage, as in *Cooley* vs. *Port Wardens*, 12 How., 299, or the showing of lights by ships in a harbor, as in *Gray* vs. *Fraser*, 21 How., 184, or the construction of a dam across the Chipewa River, "a small stream lying wholly within the State of Wisconsin, but emptying its waters into the Mississippi," as in *Pound* vs. *Turck*, 95 U. S., 459—matters as to which the State may act locally and provisionally until Congress interposes (*Wilson* vs. *Blackbird Creek Co.*, 2 Peters, 245), "Whatever subjects of this power are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress" (*Cooley* vs. *Port Wardens, supra*). It was said by Mr. Justice

Bradley in *Robbins* v. *Taxing District*, 120 U. S., 492, that the commercial power, in Congress, "is necessarily exclusive wherever the subjects are national in their character or admit only of one uniform system or plan of regulation." And further:

> "Another established doctrine of this Court is, that where the power of Congress to regulate is exclusive, the failure of Congress to make express regulation indicates its will that the subject shall be left free from any restrictions or impositions, and *any regulation* of the subject by the States, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom."

And in the case of *County of Mobile* vs. *Kendall*, 102 U. S., 691, it was said by the Supreme Court:

> "Commerce with foreign countries and among the States, strictly construed, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce as thus defined there can be *only one system of rules*, applicable *alike* to the *whole* country; and the authority which can act for the whole country can *alone* adopt such a system. Action upon it by *separate States* is not, therefore, permissible. Language affirming the exclusiveness of the grant of power over commerce *as thus defined* may not be inaccurate, when it would be so *if applied to legislation upon subjects which are merely auxiliary to commerce.*"

If, then, the purchase of the Huntington stock be within the power of Congress to challenge, "any regu-

lation" (*Robbins* vs. *Taxing District, supra*) or "action" (*County of Mobile* vs. *Kimball, supra*) by the States in such a matter is void—any regulation or action by the State of Ohio, as in *Ashley* vs. *Ryan, supra*, or by the State of Kentucky in the *Louisville & Nashville Case*, or by the State of Minnesota, as in the *Great Northern Case*, or by the State of New Jersey or New York, as in the *West Shore Case*, or by the State of Massachusetts, as in the *New Haven Case*. Have we come to the pass where all this legislation is to be subverted, and all these cases are to be stultified and overruled?

The history of the country and the administration of its constitution and laws, Federal and State, and the practical interpretation thereby fixed and settled upon the source and exercise of Governmental power, are at one with the legislative action of the States, and the judicial action of the highest Court of the land. There is an instructive summary, made by Mr. Justice WHITE, in the *Northern Securities Case*, 193 U. S., pp. 374-6. He says:

> "It may not be doubted that from the foundation of the government, at all events to the time of the adoption of the Anti-Trust Act of 1890, there was an entire absence of any legislation by Congress even suggesting that it was deemed by any one that power was possessed by Congress to control the ownership of stock in railroad or other corporations, because such corporations engaged in interstate commerce. On the contrary, when Congress came to exert its authority to regulate interstate commerce as carried on by rail-

roads, manifested by the adoption of the interstate commerce act, 24 Stat., 379, it sedulously confined the provisions of that act to the carrying on of interstate commerce itself, including the reasonableness of the rates to be charged for carrying on such commerce and other matter undeniably concerning the fact of interstate commerce. The same conception was manifested subsequently in legislation concerning safety appliances to be used by railroads, since the provisions of the act were confined to such appliances when actually employed in the business of interstate commerce. 28 Stat., 531. It also may not be doubted that from the beginning the various States of the Union have treated the incorporation and organization of railroad companies and the ownership of stock therein as matters within their exclusive authority. Under this conception of power in the States, universally prevailing and always acted upon, the entire railroad system of the United States has been built up. Charters, leases and consolidations under the sanction of the State laws lie at the basis of the enormous sum of property and those vast interests represented by the railroads of the United States. Extracts from the reports of the Interstate Commerce Commission and from a standard authority on the subject, which were received in evidence, demonstrate that in effect nearly every great railroad system in the United States is the result of the consolidation and unification of various roads, often competitive, such consolidation or unification of management having been brought about in every conceivable form, sometimes by lease under State authority, sometimes by such leases made where there was no prohibition against them, and by

stock acquisitions made by persons or corporations in order to acquire a controlling interest in both roads. Without stopping to recite details on the subject, I content myself with merely mentioning a few of the instances where great systems of railroad have been formed by the unification of the management of competitive roads, by consolidation or otherwise, often by statutory authority. These instances embrace the Boston and Maine system, the New York, New Haven and Hartford, the New York Central, the Reading, and the Pennsylvania systems. One of the illustrations —as to the New York Central system—is the case of the Hudson River Railroad on one side of the Hudson River and the West Shore Railroad on the other, both parallel roads and directly competitive, and both united in one management by authority of a legislative act. It is indeed remarkable if the whole subject was within the paramount power of Congress and not within the authority of the States, that there should have been a universal understanding to the contrary from the beginning. When it is borne in mind that such universal action related to interests of the most vital character, involving property of enormous amount concerning the welfare of the whole people, it is impossible in reason to deny the soundness of the assumption that it was the universal conviction that the States, and not Congress, had control of the subject matter of the organization and ownership of railroads created by the States. And the same inference is applicable to the condition of things which has existed since the adoption of the Anti-Trust Act in 1890. Who can deny that from that date to this consolidation and unification of management, by means

of leases, stock ownership by individuals or corporations, have been carried on when not prohibited by State laws, to a vast extent, and that during all this time, despite the energy of the government in moving the Anti-Trust Law, that no assertion of power in Congress under that act to control the ownership of stock was ever knowingly made until first asserted in this cause. Quite recently Congress has amended the interstate commerce act by provisions deemed essential to make its prohibitions more practically operative, and yet no one of such provisions lends itself even to the inference that it was deemed by any one that the power of Congress extended to the control of stock ownership. Certainly the States have not so considered it. As a matter of public history it is to be observed that not long since, by authority of the legislature of the State of Massachusetts, a controlling interest by lease of the Boston and Albany road passed to the New York Central system."

The States may create corporations to engage in interstate commerce. The States may determine who may buy, own and sell the stock of their corporations. When the Union Pacific bought the Huntington stock the *vires* of that transaction lay between the Union Pacific and its creator, the State of Utah. But if the Union Pacific, a large though minority stockholder, with its 37½ per cent of Southern Pacific stock, or later its 45 per cent, or again its 42 per cent, or again and now, its 46 per cent, should influence the Southern Pacific Company to an unlawful combination with the Santa Fe and whether such combination was in a freight association or through the device of a holding

company to which the stock of the parties had been instrumentally transferred, the power of Congress would attach and find its point of application, as it did in the *Trans-Missouri* and *Joint Traffic Cases*, and later in the case of the *Northern Securities Company*. And the language of the *Northern Securities Case*, 193 U. S., pp. 348-9, is pertinent. Mr. Justice HARLAN says:

> "The question of the relations of the general government with the States is again presented by the specific contention of each defendant that Congress did not intend 'to limit the power of the several States to *create* corporations, *define their purposes, fix the amount of their capital* and determine *who* may *buy, own* and *sell* their stock.' *All that is true*, generally speaking, but the contention falls far short of meeting the controlling questions in this case. To meet this contention we must repeat some things already said in this opinion. But if what we have said be sound, repetition will do no harm. So far as the *Constitution* of the United States is concerned, a State may, indeed, *create a corporation, define its powers, prescribe the amount of its stock and the mode in which it may be transferred. It may even authorize one of its corporations to engage in commerce of every kind, domestic, interstate and international.* The regulation or control of purely domestic commerce of a State is, of course, with the State, and Congress has no direct power over it so long as what is done by the State does not interfere with the operations of the general government, or any legal enactment of Congress. A State, if it chooses so to do, may even submit to

the existence of combinations within its limits that restrain its internal trade."

It was the question of an unlawful combination, to which the transfer of stock was incidental and ancillary, that ruled the *Northern Securities Case*.

VI.

The purchase by the Union Pacific of the Huntington stock by out-and-out sale to it by a stockholder in the market is not within the purview of the Federal Anti-Trust Act.

The first section of the Anti-Trust Act provides: "Every *contract, combination*, in the form of trust or otherwise, or *conspiracy*, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

And again: "*Every person* who shall *make* any such contract, or *engage* in any such *combination* or *conspiracy*, shall be deemed guilty of a misdemeanor."

It is not to be presumed that Congress in passing the Anti-Trust Act, intended to transgress its authority, under the Commerce Clause, to regulate commerce between the States, by an encroachment upon the contrasted and original police power of the States. And the disposition here will be "to construe the statute not merely so as to sustain its constitutionality, but so as to avoid a succession of constitutional doubts, so far as candor permits" (*Harriman vs. I. C. C.*, 211 U. S., 407, 424).

An out-and-out sale or conveyance is quite distinguishable from the collateral stipulation or covenant which may or may not run with the sale, and which goes by the name, contract in restraint of trade—a term "of well known meaning at common law or in the law of this country" (*Standard Oil Case, supra*, p. 515). Sir Henry Maine, in his *Ancient Law*, p. 305, takes the distinction between a proprietary right, of which the sale and transfer of property, real or personal, would be an example, availing against all the world,—and, on the other hand, the obligation arising from a contract, and availing, as in the case of the collateral, restraining covenant, against the individual or a specified group of individuals. "The *jus in re*, right *in rem*, right availing against all the world or *proprietary right*," he says, "is sharply distinguished by the analyst of mature jurisprudence from the *jus ad rem*, right *in personam*, availing against a single individual or group—or *obligation*. Now, conveyances transfer proprietary rights, contracts create obligations: how, then, can the two be included under the same name or same general conception?" In *Fletcher* vs. *Peck*, 6 Cranch, 87, it was said by Chief Justice MARSHALL: "An executory contract is one in which the party binds himself *to do or not to do* a particular thing." An obvious illustration would be a contract made by the manufacturers of iron pipe to fix the prices at which their competitive goods should be sold in interstate commerce—as in the *Addyston Case*, 175 U. S., 211; or a contract by which a group of competing railroads combined to fix the rates of interstate transportation—as was the *Trans-Missouri Case*, 166 U. S., 290; or,

passing from combination to conspiracy, a contract among striking employees to obstruct the freedom of their former employer in commercial intercourse between the States, as was the *Danbury Hat Case*, 208 U. S., 274. The obligation of the parties to the combination or conspiracy is executory, continuing, and prospective. "A contract executed," Chief Justice MARSHALL goes on, "is one in which *the object of the contract is performed;* and this, says Blackstone, *differs in nothing from a grant.*" And again, it has been said, in expressing the same thought: "Executed contracts are not properly contracts at all. The term is used to signify rights in property which have been acquired by means of contracts. The parties are no longer bound by a contractural tie" (3 *A. & E. Ency. of Law*, 1st Ed., p. 824).

An out-and-out sale is a fact accomplished—its story is in the past. But the contract in restraint of trade is purely executory; it is not the sale, but a collateral covenant which may or may not attend the sale, without affecting or derogating from the identity of the latter. The combination or conspiracy to restrain trade or to monopolize it, is not a sale; it does not stand for a proprietary right; its obligation is executory and *in personam*, it implies process, a continuity of operation, it has a future. The restrictive covenant sometimes incidental to a sale, may be expressed orally or in a writing; it may conceivably be deduced from circumstances—the statute makes no reference to its form; nor does the statute refer to the form of the conspiracy. In the nature of the case, conspiracies do not seek for

themselves a precise and formal definition; they are largely a matter of circumstantial inference. But the statute does speak of "combination in the form of trust or otherwise." The combination may take on the form of a contract *inter partes,* as in the *Addyston Case*; or the fulfillment of the obligation may be reposed in an unincorporated committee or trustee, like the Standard Oil Trust of 1882; or, in farther refinement, the combination may be operated through a corporate agency, like the Standard Oil Company of New Jersey. But whatever the category to which an inhibited transaction may be assigned, the notion, common and essential, persists all through of an executory, continuing obligation.

> "A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they succeed (*U. S.* vs. *Kissel,* 218 U. S., 601).

The combination or conspiracy is essentially a process, terminable sooner or later, but a process all the same. It is not like a sale, which is completed when made, and because it is made.

The law, certainly since *Mitchell* vs. *Reynolds,* 1 P. Wms., 181, has recognized these collateral covenants in restraint of trade. It has, however, annexed the qualification that they must be reasonable. But the term "reasonable," in law and good sense, like many other expressions,—like the term "substantial" so often found in qualification of that other term "restraint of competition," in the decisions of the Supreme Court,

since the *Trans-Missouri Case*—is measured and applied relatively to the subject-matter.

It is the main purpose of the principal contract or engagement which furnishes the standard of relativity. In *Mitchell* vs. *Reynolds*, decided long before the days of railroads and telegraphs and steamships, "and the thoughts that shake mankind," a restraint upon competition in the trade of a baker was adjudged to be reasonable, which did not go beyond the confines of a parish. In *Navigation Co.* vs. *Winsor*, 20 Wall, 64, the restraint upon the business of a steamship company took in the rivers, bays and waters of the State of California, and also the Columbia River, flowing between Oregon and Washington, and its tributaries. The restraint was held to be reasonable; and it was said that the question of reasonableness "must depend upon the circumstances of the particular case." In *Diamond Match Co.* vs. *Roeber*, 106 N. Y., 473, the restraint, determined to be reasonable, embraced the entire United States, except the State of Nevada and the territory of Montana. In *Nordenfeldt* vs. *Maxim, Nordenfeldt Co.*, App. Cas. (1904) 535, the restraint was world-wide.

There was, of course, in the sale of the Huntington stock, no incidental covenant of this kind. The main transaction stood alone, unqualified by any collateral restraints. But the incidental and collateral covenant, so well known to the law, has an interest here, because the validity of that covenant presupposed and implied the validity of the principal transaction. If it was

lawful for the purchaser of the bakery in *Mitchell* vs. *Reynolds,* to take a collateral agreement from the seller in restraint of trade and competition, then it was lawful for the buyer in removal and extinguishment of competition, to buy his competitor's bakery, with or without a restraining covenant. Nor has the lawfulness of such transactions been affected, or the right of a competitor, by out-and-out sale, to acquire and own competing property, been abridged by the Anti-Trust Act. "We are not aware," said the Supreme Court in the *Joint Traffic Case* (171 U. S., pp. 567-8),

> "that it has ever been claimed that a lease or purchase by a farmer, manufacturer, or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term, and the sale of a good-will of a business with an accompanying agreement not to engage in a similar business was instanced in the *Trans-Missouri Case* as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale and was entered into for the purpose of enhancing the price at which the vendor sells his business."

"The main contract of sale"—that is the expression just quoted from the Supreme Court in the *Joint Traffic Case:* and if the ancillary covenant in restraint of trade is valid, and unaffected by the Anti-Trust Act, the validity of "the main contract of sale" is, of course, postulated. "We suppose," said the Court of Appeals of New York, in the *Diamond Match Case* (106 N. Y.,

p. 483), "a party may legally purchase the trade and business of another for the very purpose of preventing competition." Or, as it was put by the Supreme Court of New Hampshire in *Bancroft* vs. *Embossing Co.* (72 N. H., p. 407), "contracts between parties which have for their object the removal of a rival and competitor in a business, are not to be regarded as contracts in restraint of trade."

The *Steamboat Case* in 200 U. S., p. 179, illustrates both the incidental covenant and the main contract of sale. The Portsmouth Packet Co. sold some steamers, barges, and coal-flats, and some stock in the Coney Island Wharf Boat Co., to the Cincinnati Packet Co., for a stipulated amount. The purchasing company also agreed to make a further payment, in yearly installments for five years, "provided, however, that in case of opposition to its boats by other boats running from Cincinnati to Portsmouth, Ohio, or to points above Portsmouth, not including points above Syracuse, Ohio, causing it to carry freight and passengers at certain exceedingly low rates, the time of payment of the installments shall be postponed until the opposition has ceased. It is further agreed that if the opposition continues for two years without interruption, and no annual payment be made, the Bays may cancel the agreement." Geo. W. and Wm. Bay were the chief parties in interest in the Portsmouth Company, and were joint parties of the first part with their company in making the contract. The contract further provided that for five years the parties of the first part shall not be "engaged in running or in operating, or

in any way be interested in any freight and passenger or packet business, or either of them at and from Cincinnati, Ohio, to Portsmouth, Ohio, and intermediate points; nor at and from Portsmouth, Ohio, to Cincinnati, Ohio, and intermediate points; nor at and from Syracuse, Ohio, or points between Syracuse and Portsmouth, Ohio, to or for points below Portsmouth, Ohio,"—but there was a qualification of this restraint, so far as the towing and barge business was concerned, "so long as it does not interfere with the other party's freight and passenger business from Portsmouth to Cincinnati" (p. 183).

The Court went on the assumption that interstate commerce was involved: "We will suppose then that the contract does not leave commerce among the States untouched."

Referring, now, to the sale and these restrictive covenants, the Court said: "The withdrawal of the vendors from opposition for five years, *is the ordinary incident of the sale of a business and good will*" (p. 184).

The Court now goes on:

> "It is argued, to be sure, that the last mentioned covenant is independent and not connected with the sale of the vessels. The contrary is manifest as a matter of good sense, and is proved even technically, by the words—'it is also agreed as a part of the consideration of this agreement.' By these words, the covenant not to do business between Cincinnati and Portsmouth for five years is imported into the *sale* of the ships, and made one of the conventional inducements of the purchase. The price is paid, not for the vessels alone, but for

the vessels with the covenant. So, still more clearly, the parallel installments for five years are paid for the covenant at least in part. It is said that there is no sale of good-will. But the covenant makes the sale. Presumably, all that there was *to sell, besides certain instruments of competition,* was the competition itself, and the purchasers did not want the vendors' names."

The Court continues:

"This being our view of the covenant in question,—whatever differences of opinion there may have been with regard to the scope of the Act of July 2, 1890, there has been no intimation from anyone, we believe, that such a contract, made *as part of the sale of the business,* and not as a *device* to control commerce, would fall within the Act; on the contrary, it has been suggested repeatedly that such a contract is not within the letter or spirit of the statute, *United States* vs. *Trans-Missouri Freight Association,* 166 U. S., 290, 329; *U. S.* vs. *Joint Traffic Association,* 171 U. S., 505, 568, and it was decided so in the case of a patent, *Bement* vs. *National Harrow Co.,* 186 U. S., 70, 92."

Suppose the Huntington stock had been in this Portsmouth Co.; and suppose the Union Pacific is put in the place of the Cincinnati Co.: would the sale of the Huntington stock to the Union Pacific, with or without restrictive stipulations, "fall within the Act," as interpreted by this decision?

The sale of the Huntington stock certainly has none of the features of combination or conspiracy. The

parties to a combination or conspiracy do not answer to that conception unless they combined together, unless they conspired together—unless they are acting in co-operation, after the manner of a partnership, as was indicated in *U. S.* vs. *Kissel,* 218 U. S., 601. Union, not disunion, is the note of a combination or conspiracy. The accomplished sale of the Huntington stock, while it brought the parties together, straightway put them asunder. It was hail and farewell. If, in its contemplation, it had a centripetal moment—a *punctum temporis,* —in its execution, it was centrifugal. The parties did not "remain in business" (*Kissel Case, supra*), like the pipe men in the *Addyston Case;* they did not remain in business like the oil men in the *Standard Oil Case,* who merely changed the form of their holdings—in the first instance, for a trustee's certificate; and later changed the form again by exchanging, not selling, their stock for the stock of the corporate agency which supplanted the trustee. "There is a clear distinction," said the Circuit Court of Appeals in *Davis* vs. *Booth,* 131 Fed., 31, 37,

> "which seems to be lost sight of in the argument here, between the aggregation of properties by purchase when the seller no longer retains an interest in the property, and a combination of owners and properties under one management, where each owner's interest is continued in the combination. It may be that the practice of acquiring by a single corporation, through purchase of a great number of single plants in several states, of power to control the market of a given commodity in a wide area of territory, may become injurious to the public, but, if so, it would seem

that the limitations and the means for the restriction and correction required, must be supplied by the law-making power, since the old law against forestalling the market has become obsolete."

And again:

"We think that the intent which made the contract or combination unlawful was one in which both parties participated, and that the act was not intended to comprise the case where there was a sale and purchase of property, after which the seller should have no interest in the property."

It may be, that a transaction the legality of which is clear enough when "isolatedly viewed" (*Tobacco Case, supra*, p. 649) is incidental to and imbedded in an unlawful combination (*Continental Paper Co.* vs. *Voight*, 212 U. S., 227). In the *Northern Securities case*, the transfer and ostensible sale of the stock to the holding company, was purely instrumental to the purposes of the unlawful combination. The concurring bodies of stockholders retained their interests and remained in the business.

"What the government," says the opinion in the *Northern Securities case*, "particularly complains of—indeed, *all* that it complains of here—is the existence of a *combination among the stockholders of competing railroad companies*, which, in violation of the act of Congress, restrains interstate and international commerce *through the agency of a common corporate trustee*, designated to act for *both* companies in repressing free competition between them. *Independently of any question of the mere ownership of stock or of the organization of a state corporation*, can it in rea-

son be said that *such a combination* is not embraced by the very terms of the Anti-Trust Act?" (193 U. S., pp. 334-5).

And in the same connection, Mr. Justice BREWER said in his opinion:

"It [Northern Securities Company] is an artificial person, created and existing only for the convenient transaction of business. *In this case*, it was a *mere instrumentality* by which *separate* railroad properties were *combined* under one control. That *combination* is as direct a restraint of trade by destroying competition *as the appointment of a committee* to regulate rates. The prohibition of such a *combination* is not at all inconsistent with the right of an individual."

Harriman vs. *Northern Securities Co.*, 197 U. S., 285, was an outgrowth of the *Northern Securities case*.

The decree in the principal case enjoined the Northern Securities Company from voting the stock or collecting the dividends. But it left the stock on the hands of the holding company, and therefore a saving and final clause was inserted in the decree as follows:

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the *stockholders* of the Northern Pacific Railway Company and the Great Northern Railway Company *respectively, any and all shares of stock* in either of said railway companies which said the Northern Securities Company may have heretofore received *from such stockholders* in exchange for its

own stock" (*Harriman* vs. *Northern Securities Co.*, 197 U. S., p. 290).

It was held that this provision "was purely permissive; it did not command that the stock should be so returned, or exclude other methods of disposition of it that, in view of the circumstances, might appear to be more equitable" (p. 290).

It is not to be overlooked, however, that such permission, accorded in the decree, was fraught with the implication that the Northern Pacific stock in which was reflected a half interest in the Burlington, and which the Union Pacific had purchased in the market, could be returned to the Union Pacific, and the title thereto reinstated, by the Securities Company without running counter to anything decided or adjudged in the main case. The original common stock of the Northern Pacific, which the Union Pacific had exchanged for the stock of the Securities Company, was intact. But the Northern Pacific preferred, bought in market by the Union Pacific, and similarly exchanged, had, on the retirement of Northern Pacific preferred, been converted into common stock by the Securities Company, on the strength of its status as a common stockholder, in "the exercise of the right of subscription" (*Harriman* vs. *Securities Co.*, *supra*, p. 298). On the liquidation of the Securities Company, Harriman and Pierce, as trustees for the Union Pacific, or more accurately, the Oregon Short Line, demanded the return of the Northern Pacific stock of their principal, original and subscribed, on the foot of the decree. But the Securities Company had resolved otherwise. It assumed

the two stocks, Northern Pacific and Great Northern, into a common fund, as general assets, and it proposed to make a ratable distribution of those assets to its own stockholders, parceling out to each stockholder, including the Union Pacific or Short line, his *pro rata* as well of Great Northern as of Northern Pacific. The Oregon Short Line insisted on the *status quo ante* as against the ratable distribution, and upon that issue *Harriman* vs. *Northern Securities Co.* was litigated.

The *internecine* nature of this conflict is at once noticed by Mr. Chief Justice FULLER. "We are of opinion," says he, "that the Circuit Court did not determine the quality of the transfer *as between the defendants themselves*, nor was that the purpose of the Government proceedings."

But these defendants had been joint parties to a delict, to an unlawful combination, amenable, at the instance of the Government, to injunctive process in equity, or punishable as a misdemeanor. The Union Pacific was *in pari delicto* with the Northern Securities Company, and in the controversy between them, entitled *Harriman* vs. *Northern Securities Co.*, the Securities Company occupied a defensive attitude—*conditio defendentis*. The law left the parties where it found them; the defendant remained in occupation and prevailed; the complainant was estopped by the common delict to challenge, *inter partes*, the sale or exchange, and was held to be bound by the ratable distribution. The main case, meanwhile, had gone off upon the illegality of the *combination*, "no matter what

the tenure of title was" (*Harriman* vs. *Northern Securities Co., supra*, p. 291).

> "By the transfer of the Northern Pacific shares," said the Court in the *Harriman Case*, "and the payment therefor as agreed, the contract was executed, and the implied obligations resulting from the relation of corporation and stockholder *alone* remaining executory. And when the Securities Company resolved to distribute these railway shares ratably among all its stockholders, it did this in performance of its contract with them and not in repudiation of it. It is the complainants who are seeking the determination and repudiation of the contract. Their final contention in that regard is, that they are entitled to a decree rescinding the contract of purchase and sale, and directing the return of the railway shares parted with by them thereunder, because of the illegality of the transaction as adjudged in the Federal Courts. *And this in defiance of the settled rule that property delivered under an illegal contract cannot be recovered back by any party in pari delicto*" (p. 295).

This was the *ratio decidendi*.

> "If the contract is illegal," said the Chief Justice, "*affirmative relief* will not be granted at law or in equity unless the contract remains *executory*, or unless the parties are considered *not in equal fault*, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant" (p. 296).

The Chief Justice saw nothing in the executed contract before him to take the case out of the general rule.

> "The record discloses," he says, "*no special considerations* of equity, justice or public policy which would justify the courts in relaxing the rigor of the rule which bars a recovery" (p. 296).

The decree for affirmative relief, as prayed by complainants, would be inequitable. It would be inequitable *to decree* "the delivery to complainants of a majority of the total Northern Pacific stock, and a ratable distribution of the remaining assets to the other Securities' stockholders" (p. 297), and the Chief Justice added that this "would directly contravene the object of the Sherman law and the purpose of the Government's suit, since the Northern Pacific, taken in connection with the Burlington system," is competitive with the Union Pacific, and "*the decree sought by complainants* would tend to smother that competition" (p. 297). The Union Pacific, as the Chief Justice viewed it, although itself a party to the unlawful combination, was asking the Court to enter a decree in its favor for affirmative relief in the way of compelling a co-conspirator, the Northern Securities Company, to make an allotment of Northern Pacific stock, special to the case of the Union Pacific, different from the case of all other stockholders in the Securities Company, and which would have the effect of transferring, by judicial decree, from one member of the combination to another, a majority of the total Northern Pacific stock. The *upshot of the combination* would be the "smothering," *by a decree*

of court, of competition, which had previously existed between the Burlington, of which the Northern Pacific owned half, and the Union Pacific, and such a consequence, as that did not raise *any special consideration* of equity, upon which as a basis, the rigor of the rule *in pari delicto* should be relaxed.

But the Supreme Court in deciding the main case had said: *"No valid objection can be made to the decree below, in form or in substance."* Certainly that decree recognized, by most persuasive implication, the title of the Union Pacific to the Northern Pacific stock which it had bought in the market. If the Northern Securities Company, instead of ratable distribution, had adopted the plan of an integral restitution, it would have been clearly within the lines of the main decree, and the title of the Union Pacific by voluntary act *inter partes,* would have been reinstated. That would have been, however, quite a different condition of things from that presented by the Union Pacific, on the ground of its acknowledged delict, seeking rescission of an executed contract against its partner in the delict, from a court of equity by way of a decree for affirmative relief. There is nothing in the case of *Harriman* v. *Securities Company* to impeach the title of the Union Pacific to the Northern Pacific stock, as in the first instance, and by purchase in the market. On the contrary, the Chief Justice starts with that title, as a known quantity, affirms its translation into the assets of the Northern Securities Company, and approves and requires the ratable distribution of assets thus deraigned among the stockholders of the Securities

Company. The effect of that distribution was to make every stockholder in the Securities Company, including the Union Pacific itself, the owner of stocks in two competing lines.

The Union Pacific would receive, "instead of stock of the Northern Pacific Company of the par value of $71,732,062 claimed by them, stock of that company amounting at par to only $32,070,612, and stock of the Great Northern Railway Company of the par value of $24,638,919" (*Harriman* vs. *Securities Co.*, 132 Fed., pp. 478-9). This would amount to about 21 per cent of the total Northern Pacific stock, and to about 20 per cent of the total Great Northern stock; and the foundation upon which the Union Pacific title to these stocks in these competing companies rested was the very Northern Pacific stock which it had bought in open market, and had afterwards transferred, *inter partes*, into the ownership and treasury of the Securities Company, as assets of that corporation.

After the case of *Harriman* v. *Securities Company* had been decided, the *Cincinnati Packet Case* (200 U. S., p. 185) came before the Supreme Court. It was there held that a contract by one interstate carrier for the purchase of the physical property and stock of a competing interstate carrier was not within the Anti-Trust Act, although there was attached to the sale an express covenant in restraint of future competition by the vendor. "Presumably," says the court, "all that there was *to sell*, besides certain *instruments of competition* was *the competition itself*." The differential na-

ture of a combination to control prices, in contrast with an out and out sale, like the sale in the *Cincinnati Packet Case,* was in the mind of the Court in *National Cotton Oil Co.* v. *Texas* (197 U. S., p. 129), where the Court said:

> "It is the power to control prices which makes the inducement of the combinations and their profit. It is such power that makes it the concern of the law to prohibit or limit them."

Something more than the acquisition of a competing property is necessary to bring the purchaser and seller within the Federal statute. As the Supreme Court said in the *Shawnee Compress Company Case* (209 U. S., 434):

> "This case presents something more than the lease of property by the Shawnee Company induced or made necessary by financial embarrassment. It presents *something more* than the acquisition by the Gulf Company of another compress—of a mere addition to its business. *It presents acts in aid of a scheme of monopoly.*"

In the *Shawnee Case,* the lessee, writing to the lessor, had thus expressed the purpose and scheme of the proposed lease:—"*Our getting together* on a lease proposed, means the avoiding for each other, directly or indirectly, of the possibility, if not probability, of unnecessary competition."

Further, as the Court points out, the lessor *"went out of the field of competition; it covenanted not to*

enter that field again, and it pledged itself to render every assistance to prevent others from entering it."

And in *Chemical Co.* v. *Provident Co.*, 64 Fed., 950, it was said:

> "The defendant had a perfect right to buy off the competition of a dangerous, powerful and aggressive rival. The law of self-defense and protection applies to one's business as well as to his person."

And again:

> "Our attention has been called to many cases which condemn, in perhaps not too severe terms, combinations and trusts. It is a nervous and alarmed imagination which sees in every transaction involving large exchange of properties a monster threatening public interests. Combinations in the nature of modern trusts, so soundly condemned, are those which aid *at a union* of energy, capital and interest to stifle competition, and enhance the price of articles of prime necessity and staples of commerce. In such cases there is absent the element of exchange of one valuable right or thing for another. In the contract here we find *none of the elements of a combination or trust.* It is *a simple lease and sale* for a fair and reasonable compensation, with stipulations only commensurate with reasonable, necessary protection."

The case at bar is not a *Northern Securities Case,* nor is it the case of a "persistent expenditure of millions upon millions of dollars in buying up plants, not for the purpose of utilizing them, but in order to

close them up and render them useless for the purposes of trade" (*Tobacco Case, supra,* p. 649).

Nor is a sale made criminal or innocent by the statute, according as it is larger or not so large. The test is not size.

It was said by Judge JACKSON in the *Greene Case* (52 Fed., p. 115):

> "It is very certain that Congress could not and did not, by this enactment [Anti-Trust Act], attempt to prescribe limits to the acquisition, either by the private citizen or State corporation, of property which might become the subject of interstate commerce, or declare that, when the accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein, or any part thereof, among the States, a criminal offense was committed by such owner or owners."

And combinations themselves, it is now understood, are not necessarily and universally unlawful. They must go the length of "an undue restraint of interstate or foreign commerce" (*Standard Oil Case, supra,* p. 515).

> "The statute," it was said in the *Standard Oil Case,* p. 515, "under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or

new, which would constitute an interference,—that is, an undue restraint."

The statute was not passed to solve the domestic problems of parties to a combination *inter sese*. It was leveled as its title indicates, against *unlawful* restraints and monopolies—unlawful, in the sense that they operated to the detriment of the public, to the exclusion from business of strangers to the combination. The sanctions of the statute are by way of an indictment, of a forfeiture *in transitu*, and of two civil proceedings, one in equity, the other at law for damages. The indictment and seizure are, of course, proceedings at the instance and in the name of the United States. In the equity proceedings, the United States is *dominus litis;* it is a trustee plaintiff, *ad hoc*, not in aid of a party to the combination, but for the benefit of those who are outside the combination. The action at law is reserved to a stranger to the combination; to one who has suffered damage at its hands. But the restraint upon the stranger, or upon strangers, as the statute proclaims in its title, must be an *unlawful* restraint. Every restraint of competition is not unlawful. Indeed the statute is not addressed to the competition, among themselves of parties to a combination; it is pointed at restraints imposed by the combination upon strangers. It would not prohibit "a reasonable and just agreement made for the purpose of ending a trade war" (*Tobacco Case, supra*, p. 647). A combination "to maintain a fair and uniform price, and to prevent the injurious effects both to producers and customers of fluctuating prices caused by undue com-

petition," is not condemned. "When it appears that the combination is used to the public detriment, a different question will be presented" (*Roller Co.* vs. *Cushman*, 143 Mass., 353, 364).

> "Undoubtedly there may be combinations so destructive of the right of the people to buy and sell and to pursue their business freely that they must be declared to be void upon the ground of public policy. In such cases, the injury to the public is the controlling consideration. But it does not follow that every combination in trade, even though such combinations may have the effect to diminish the number of competitors in business, is therefore illegal. Such a rule would produce greater public injury than that which it would seek to cure. It would be impracticable. It would forbid partnerships and sales by those engaged in a common business. It would cut off consolidations to secure the advantages of united capital and economy of administration. It would prevent all restrictions and exclusive privileges, and hamper the familiar conduct of commerce in many ways. There may be many such arrangements which will be beneficial to the parties, and not injurious to the public" (*Oakdale Co.* v. *Garst*, 28 Atl., 973).*

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* See also *Harriman* v. *Menzies*, 115 Cal., 19; *Collins* v. *Locke*, L. R., 4 App. Cas., 674; *Skrainka* v. *Scharring-Hausen*, 8 Mo. App., 522; *Leslie* v. *Lorillard*, 110 N. Y., 519; *Cohen* v. *Berlin*, 56 N. Y. Suppl., 588; *Kellog* v. *Larkin*, 3 Pinney, Wisconsin, 123; *Dolph* v. *Troy Co.*, 28 Fed., 554; *Mathews* v. *Associated Press*, 32 N. E., 981; *Vinegar Co.* v. *Vochrbach*, 148 N. Y., 58; *Macauley* v. *Tierney*, 19 R. I., 255; *Bohn* v. *Mfg. Co.*, 54 Minn., 233; *Cote* v. *Murphy*, 159 Pa. St., 420; *Ins. Co.* v. *Bd. of Underwriters*, 67 Fed., 317; *Nat'l Ass'n* v. *Cumming*, 170 N. Y., 315; *Vogelen* v. *Ganter*, 167 Mass., 92, opinion of HOLMES, *J.*

It must be allowed generally, that where the combination has been "entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade," it is not within the statute (*Standard Oil Co., supra,* p. 515). The antithesis is, that where it has been entered into with *wrongful* intent and purpose to *injure* the general public and effect to the exclusion of others, it is prohibited (*Standard Oil Case, Supra*).

Now, then, "a consideration of the text of the 2d section serves to establish that it was intended to supplement the first and to make sure that by no possible guise could the public policy embodied in the 1st section be frustrated or evaded" (*Standard Oil Case, supra,* p. 516). This Court, at the same place, speaks "of the practical evolution by which monopoly and the acts which produce the same result as monopoly, *that is, an undue restraint of the course of trade,* all came to be spoken of as, and to be indeed synonymous with, restraint of trade." We are to inquire, in all cases, whether the contracts or acts sought to be imputed to unlawful combination or monopoly,

> "were *unreasonably restrictive* of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed *with the legitimate purpose* of *reasonably forwarding personal interest* and *developing trade,* but, on the contrary, were of such character as to give rise to the inference or presumption that they had been entered into or done with

> *the intent to do wrong* to the general public and to limit the *right* of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy" (*Standard Oil Case, supra,* p. 515).

And the court remarks upon the altered point of view that went with the development of the law—

> "contracts or acts were at one time deemed to be of such a character as to justify the inference of *wrongful intent,* which were at another period thought not to be of that character."

This is illustrated by the repeal of the old English statute against engrossment.

As the Anti-Trust Act "was drawn in the light of the existing practical conception of the law of restraint of trade" (*Standard Oil Case, supra*), it will be of advantage to turn to the *Mogul S. S. Co. Case,* in which the decision, although announced shortly after the passage of the Anti-Trust Act, "serves reflexly," as this Court said in the *Standard Oil Case,* "to show the exact state of the law in England at the time the Anti-Trust statute was enacted." It was said by BOWEN, *L. J.,* in his celebrated judgment (*Mogul S. S. Co.* v. *McGregor,* L. R., 23 Q. B. D., p. 612):

> "We were invited by the plaintiff's counsel to accept the position from which their argument started—that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade. Obscurity resides in the language used to state this prop-

osition. The terms 'maliciously,' 'wrongfully,' and 'injure' are words all of which have accurate meanings, well known to the law, but which also have a popular and less precise signification, into which it is necessary to see that the argument does not imperceptibly slide. An intent to 'injure,' in strictness means more than an intent to harm. It connotes an intent to do *wrongful* harm. 'Maliciously,' in like manner, means and implies an intention to do an act which is wrongful, to the detriment of another. The term 'wrongful' imports, in its turn, the infringement of some right. The ambiguous proposition to which we were invited by the plaintiff's counsel, still, therefore, leaves unsolved the question of what, as between the plaintiffs and defendants, are the rights of trade. For the purpose of clearness, I desire, as far as possible, to avoid terms in their popular use *so slippery*, and to translate them into less fallacious language wherever possible."

And again (p. 618), he says:

"What, then, were the rights of the plaintiffs as traders as against the defendant? The plaintiffs had a right to be protected against certain kind of conduct; and we have to consider what conduct would pass this legal line or boundary. Now, intentionally to do that which is calculated in the ordinary course of events to damage and which does, in fact, damage another in that other person's property or trade, is actionable *if done without just cause or excuse*. Such intentional action when done without just cause or excuse, is what the law calls a malicious wrong. The acts of the defendants which were complained of here were intentional, and were also calculated, no doubt, to do the plaintiffs damage in their

trade. But in order to see whether they were *wrongful,* we have still to discuss the question whether they were done without any just cause or excuse."

In the House of Lords (1892) A. C., p. 38, it was said by the Lord Chancellor:

"I think this question is the first to be determined: What injury, if any, has been done? *What legal right* has been *interfered with?* Because if no *legal* right has been interfered with, and no *legal injury* inflicted, it is vain to say that the thing might have been done by an individual, but cannot be done by a combination of persons."

Now, BOWEN, *L. J.,* goes on to say, *ubi supra:*

"What, then, are the limitations which the law imposes on a trader in the conduct of his business as between himself and other traders? There seem to be no burdens or restrictions in law upon a trader which arise merely from the fact that he is a trader, and which are not equally laid on all other subjects of the Crown. His right to trade freely is a right which the law recognizes and encourages, but it is one which places him at no special disadvantage as compared with others. No man, whether trader or not, can, however, justify damaging another in his commercial business by *fraud or misrepresentation. Intimidation, obstruction, and molestation* are forbidden; so is the intentional procurement of a *violation* of individual *rights,* contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by show of violence; the obstruction of actors on the stage by preconcerted hissing; the disturbance of wild fowl in decoys by

> the firing of guns; the impeding or threatening servants or workmen; the inducing persons under personal contracts to break their contracts; all are instances of such forbidden acts [Citing cases]. But the defendants have been guilty of none of these acts. They have done nothing more against the plaintiffs than pursue to the bitter end a war of competition waged in the interest of their own trade."

Contracts and acts, then, are "unreasonably restrictive of competitive conditions," when they proceed by *unlawful* means and methods. "What is the definition of 'fair competition?'"—Lord Bramwell asked pertinently in the *Mogul Case*, in the House of Lords, *supra*, p. 47; and he answered his own question with another—"What is unfair that is *neither forcible nor fraudulent*"? Lord Morris said, in the same case, p. 49: "It is not illegal for a trader to aim at *driving a competitor out of trade*, provided the *motive* be his own gain by appropriation of the trade, and the *means* he uses be *lawful weapons*." In *Whitwell* vs. *Continental Tobacco Co.*, 125 Fed., 459, it was said that "an attempt by each competitor to monopolize a part of interstate commerce is the very root of all competition therein." "Competition," remarked the court in *Bonsack* v. *Smith*, 70 Fed., p. 388, "it is often said, is the life of trade. But the effort of all competition is to drive out other competitors."

If a competitor may be driven out lawfully, by the adversary use of competition, may he not, just as lawfully, be retired by the voluntary, contractual method

of a sale? *Monopoly in the concrete,* as the result of individual initiative and acquisition—in distinction from the Elizabethan monopolies granted by a Sovereign to a favorite—*is not prohibited at common law,* and so far as the Anti-Trust Act is concerned, there is *"the omission of any direct prohibition against monopoly in the concrete"* (*Standard Oil Case, supra.*) Although individual initiative, by methods *not unlawful,* may have compassed a practical or virtual monopoly, the policy of the law seems to be one of *laissez-faire.* The result, it seems to have been thought might be left to the inter-play of economic forces, in an environment of free individual activity. "It indicates," said this Court in the *Standard Oil Case, supra,* p. 516, "a consciousness that the freedom of the individual right to contract, when not unduly or improperly exercised, was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make *unlawful* contracts having a monopolistic tendency were permitted" (See also *in re Greene,* 52 Fed., p. 115).

Judge Taft, in a responsible address made by him at Columbus, Ohio, August 19, 1907, speaks of monopolizing under the Anti-Trust Act: "I conceive that it is not sufficiently defined by saying that it is the combination of a large part of the plants in the country engaged in the manufacture of a particular product in one corporation. There must be *something more*

than a mere *union of capital and plants* before the law is violated. There must be some *use* by the company of the comparatively great size of its capital and plant and extent of its output, either to *coerce* persons to buy of it, rather than of a competitor, or to *coerce those who would compete with it* to give up their business. There must, in other words, be an element of *duress* in the conduct of its business towards the *customers* in the trade and *its competitors* before a mere aggregation of plants becomes an *unlawful* monopoly."

As Mr. Justice HOLMES pointed out in the *Northern Securities Case, supra* (p. 406):

> "The mere reading of those words [monopolizing or attempting to monopolize some part of the commerce between the States] shows that they are used in a limited and accurate sense. According to popular speech, every concern monopolizes whatever business it does, and if that business is trade between two States, it monopolizes a part of the trade among States. Of course, the Statute does not forbid that. It does not mean that all business must cease. A single railroad down a narrow valley or through a mountain gorge monopolizes all the railroad transportation through that valley or gorge. Indeed, every railroad monopolizes, in a popular sense, the trade of some area."

Mere size, or aggregation by purchase, apparently does not furnish forth the differential element which gives point and interpretation to the second section.

Is the individual who buys off, by out-and-out sale, one competitor, guilty of monopolizing or attempting

to monopolize? It would seem to be settled beyond cavil that an individual may not only make such a purchase lawfully, but he may make it for the express purpose of extinguishing competition, and he may avow and enforce that purpose by an explicit contract in restraint of the vendor's freedom of trade. But suppose he buys out a second competitor, and a third, and a fifth, are the succeeding transactions, either as they arise, or in their aggregation, less lawful than the first purchase? Size has not been understood to be the test, "The magnitude of a party's business, production, or manufacture, with the incidental and indirect powers thereby acquired, and with the purpose of regulating prices and controlling interstate traffic in the articles or commodities forming the subject of such business, production, or manufacture, is not the monopoly, or attempt to monopolize, which the statute condemns" (*Greene Case*, 52 Fed., p. 115).

But the Statute says, "any part" and if the purchase of a competitor's business amounts to the monopolizing of interstate commerce in the subject matter, when the purchase has been multiplied five times, does the purchase amount to monopolizing, or the attempt to monopolize, a part of the interstate commerce in the subject matter, when the multiple is three or two? Certainly the business of one competitor is "a part" of the interstate commerce, though not so large a part as the business of two or three. And yet, the purchase of the business of a competitor, and with a restrictive covenant at that, is clearly lawful.

In the *Trenton Potteries Case*, 58 N. J. Eq., 507, it was assumed that contracts among independent manufacturers looking to the enhancement of prices, and the monopolization of trade, by limitation of output, by restriction of distribution, and by express and conventional ascertainment, are against the public policy and unenforceable. But in the same case, the Court saw clearly the distinction between such a combination of "otherwise competing" parties, and the purchase of a competitor's plant or business, and vindicated the right of the individual, or corporation, to make the purchase and to multiply it. The Court said (p. 524):

> "While contracts to restrain or limit competition in the production of that ware (pottery) may be repugnant to the public interest, such a restraint or limit may result from contracts which the Courts are bound to enforce. A person engaged in any manufacture or trade, having the right to acquire and possess property and to do with it what he chooses, may lawfully buy the business of any of his competitors. His first purchase would at once diminish competition. If he continued to purchase, each succeeding transaction would remove another competitor. If his capital were large enough to enable him to buy the business of all competitors, the last purchase would completely exclude competition, at least for a time."

This is reminiscent of what Mr. Justice BROWN said in the *Pearsall Case* concerning the right of the Great Northern shareholders to purchase the stock of the Northern Pacific; and of what Mr. Justice BREWER said in the *Northern Securities Case*, touch-

ing Mr. Hill, *ex hypothesis* the majority owner of Great Northern stock, and his right to purchase Northern Pacific shares; and of what Mr. Justice HOLMES said in the same case as to Mr. Morgan being sent to prison if he should buy as many shares as he liked of Great Northern and Northern Pacific, "even if he bought them both at the same time and got more than half of the stock of each road."

But the New Jersey Court goes on:

> "But in the absence of legislative restriction (*if such could be imposed*) upon the acquisition of such property and its use when so acquired, Courts could impose no limitation. They would be obliged to enforce such contracts, notwithstanding the effect was to diminish or even to exclude competition."

And further:

> "But appellant is a corporation and not an individual. Corporations, however, may lawfully do any acts within the corporate powers conferred on them by legislative grant. Under our liberal corporation laws, corporate authority may be acquired by aggregations of individuals organized, as prescribed, to engage in and carry on almost every conceivable manufacture or trade. Such corporations are empowered to purchase, hold and use property appropriate to their business. They may also purchase and hold the stock of other corporations. Under such powers, it is obvious that a corporation may purchase the plant and business of competing individuals and concerns. The Legislature might have withheld such powers or imposed limitations on their use. In the absence of prohibition or limitation on their powers in this

respect, it is impossible for the courts to pronounce acts done under legislative grant to be inimical to public policy. The grant of the Legislature authorizing and permitting such acts must fix for the courts the character and limit of public policy in that regard."

And finally:

"It follows that a corporation empowered to carry on a particular business may lawfully purchase the plant and business of competitors, although such purchase may diminish or, for a time at least, destroy competition."

It is evident,—*fraudulent, intimidating, coercive, and other like wrongful and unlawful* methods apart —that here we touch a fundamental principle of the freedom to buy and sell, of the legal right of the individual in respect to his own property.

"The general language of the act," said Mr. Justice BREWER, in the *Northern Securities Case, supra*, p. 361, in acknowledging the limitation of the Anti-Trust Act to unreasonable restraint, "is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen. If, applying this thought to the present case, it appeared that Mr. Hill was the owner of a majority of the stock in the Great Northern Railway Company he could not by any act of Congress be deprived of the right of investing his surplus means in the purchase of stock of the Northern Pacific Railway Company, although such purchase might tend to vest in him through

that ownership a control over both companies. In other words, the right, which all other citizens had, of purchasing Northern Pacific stock could not be denied to him by Congress because of his ownership of stock in the Great Northern Company."

In *Harriman* v. *I. C. C.*, 211 U. S., 407, the witness Harriman had been inquired of touching *the purchase* by the Union Pacific, or its affiliated line, the Oregon Short Line, of stock in the competing railroad of the Santa Fe Company—upon the notion, that *such purchase* could be made the subject of complaint or investigation within the general powers of the Interstate Commerce Commission. It was the opinion of this Court—

"that the purpose of the act for which the Commission may exact evidence embraces only complaints for violation of the act, and investigation by the Commission upon matters that might have been made the object of complaint. * * * The power to require testimony is limited, as it usually is in English speaking countries at least, to the only cases where the sacrifice of privacy is necessary—those where the investigation concerns *a specific breach of the law*" (pp. 419-420).

And again (p. 418):

"How far Congress could legislate on the subject-matter of the questions put to the witnesses was one of the subjects of discussion, but we pass it by. Whether Congress itself has the unlimited power claimed by the Commission we also leave on one side. *It was intimated that there was a limit* in *I. C. C.* v. *Brimson*, 154 U. S. 447, 478, 479."

And in this *Brimson Case,* the court said:

> "It was said in argument that the twelfth section was in derogation of those fundamental guarantees of personal rights that are recognized by the constitution as inhering in the freedom of the citizen. It is scarcely necessary to say that the power given to Congress to regulate interstate commerce *does not carry with it any power to destroy or impair those guarantees.*"

In *Biglow* v. *Calumet Co.,* 167 Fed., 704, where the bill charged a violation of the Anti-Trust Act, the Circuit Court, on a review of the *Pearsall Case,* 161 U. S., 646, and the *Northern Securities Case,* 193 U. S., 361, held it to be *"well settled that individual stockholders may lawfully own a controlling interest in each of two competing companies."* And in the same case, in the Circuit Court of Appeals, 167 Fed., 727, it was said:

> "But when the agreement or combination in question does not in its terms provide for the suppression of competition or the creation of a monopoly, nor bring about such a result as a necessary legal consequence, but requires further acts or conduct to bring about such an *unlawful* result, some evidence of an *unlawful* intent becomes essential, that the courts may see that, if not stopped, a prohibited restraint is likely to be created. * * * The power of stock control which the Calumet Company has acquired may be exercised only in a legitimate and lawful way in the interest of an economical management of both companies. In that case, it has done nothing directly affecting commerce among the states."

We may profitably recall, at this point, the finding of the Circuit Court:

> "*The actuating intent and purpose* of the Union Pacific Company in acquiring the Huntington stock was to secure a permanent and reliable connection at Ogden for through traffic over the Central Pacific line to the Pacific coast, and thereby to save the necessity for constructing a road of its own from Ogden to San Francisco."

And again:

> "*The immediate and actuating intent* and purpose of the Union Pacific Company in acquiring the Huntington stock and thereby the control of the operations of the Southern Pacific line were, according to the proof, to secure a permanent working and reliable connection at Ogden over an existing road for its through traffic—a connection not dependent upon the grace of a dominant co-partner but one within its own control."

This concludes the argument. It is to be hoped that the length of this brief will be somewhat atoned for, if, in the result, it has operated, by fullness of statement and reference, measurably to assist and relieve the labor of this Court in dealing with a record unusually voluminous. It is now, therefore, on the whole case, respectfully submitted, that the decree of the Circuit Court should be affirmed.

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